





Cornell University  
Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.

Cornell University Library  
**KFV2445.A245**

**A General Index of Grattan's Virginia re**



**3 1924 017 698 840**

law

















GENERAL INDEX

OF

Grattan's Virginia Reports,

FROM

FIRST TO ELEVENTH VOLUME INCLUSIVE,

BY

A. B. GUIGON,

OF THE

RICHMOND BAR.

---

J. W. RANDOLPH:  
121 MAIN STREET, RICHMOND.  
1859.





# ANALYTICAL DIGESTED INDEX

OF

GRATTAN'S VIRGINIA REPORTS.

---

## ABSENT DEBTORS.

See ABSENT DEFENDANTS.

---

## ABSENT DEFENDANTS.

1. *Quære*. If the Act, 1 Rev. Code, ch. 123, p. 474, authorized proceedings in equity against an absent debtor jointly and severally bound with other persons residing in the state: he having no property within the jurisdiction of the court. And if the said act authorized a personal decree against an absent defendant. *Hairston et als. v. Medley*, 1 Grat. 96.

2. An absent debtor, who satisfies a decree against himself and a home defendant, is entitled to his effects attached in the hands of the home defendant. *Jameson's Adm'x v. Deshields*, 3 Grat. 4.

3. The distributable interest of an absent debtor, in an estate, may be subjected in the hands of an administrator, by attachment, to the payment of the absent debtor's debt. *Moore v. White et als.*, 3 Grat. 139.

4. A decree against an absent debtor only stands confirmed, at the expiration of seven years, so far as it operates upon the estate of such absent debtor, subject the jurisdiction of the court. *Rootes' Ex'x v. Tompkins' Trustees*. 3 Grat. 98.\*

5. A decree *in personam* against an absent debtor is entitled, in all col-

\* See Code of Va., ch. 170, § 13.

lateral controversies, to the same respect to which any other decree is entitled. *Ibid.*

6. A decree against an absent debtor, so far as relates to any proceeding to enforce it, merges the original cause of action, and is *prima facie*, evidence of the demand it establishes. *Ibid.*

7. No statute of limitations, except that which applies to judgments and decrees, shall apply to a claim evidenced by such decree. *Ibid.*

8. A decree against an absent debtor, so far as it purports to operate *in personam* merely, creating a personal charge alone, is not conclusive after the lapse of seven years, but may be shown to be erroneous, either on its face, or by evidence, *aliunde*. *Ibid.*

9. Decrees against absent defendants have the same effect and operation as decrees against absent debtors. *Ibid.*

10. An absent defendant, against whom a decree has been made, cannot appeal therefrom. His only remedy is to petition the court which pronounced the decree, to have the error complained of corrected, as provided by 1 Rev. Code, 475. *Barbee & Co. v. Pannill & Co.*, 6 Grat. 442.\*

11. A home defendant, sued with an absent debtor, in a proceeding by foreign attachment, cannot have an interlocutory decree for the sale of land reversed, upon the grounds that the court below did not decree against the absent debtor, or direct the plaintiff to give security as provided by law in behalf of absent defendants. The final decree may provide for these things. *Kelly v. Linkenhoger*, 8 Grat. 104.

12. An absent debtor had executed a receipt to a home defendant, for the purchase money of land attached in his hands; but as the home defendant did not pretend to have paid the amount in money, and did not satisfactorily prove the accounts he endeavored to establish, the land was held liable. *Ibid.*

13. An attaching creditor, who proves his debt, is entitled to a decree *in personam* against his absent debtor, though the property attached by him may be adjudged to a claimant with a prior right thereto. *Schofield v. Cox et als.*, 8 Grat. 533.†

14. In a proceeding by foreign attachment against two absent debtors, one of whom appears and answers the bill; upon a joint decree against both, the one appearing may appeal from the decree, the other cannot. The decree, if erroneous, will be reversed as to both. *Lenows v. Lenow*, 8 Grat. 349.

15. In a suit against an absent defendant, the recital in a decree that "the cause came on as to him upon bill, &c., and order of publication duly

\* See Code of Va., ch. 170, § 13.

† See No. 18.

executed," is conclusive, that the order was duly made, published in the newspaper, and posted at the front door of the courthouse. *Craig v. Sebrell*, 9 Grat. 131.

16. The act of April 3d, 1852, Sess. acts, ch. 95, § 1, p. 78, gives a remedy in a court of equity to a creditor against his absent debtor, where the debtor has estates or debts due to him, in the county or corporation where the suit is brought. *O'Brien et als. v. Stephens et als.*, 11 Grat. 610.

17. The affidavit required, to authorize a creditor to sue out an attachment against the effects of an absent debtor, may be made before or after the bill is filed. *Ibid.*

18. If an absent defendant does not appear in the cause, there can be no personal decree against him. The attached effects can alone be subjected. But if he appear, there may be both a personal decree against him and a decree subjecting the attached effects. *Ibid.*\*

19. If the absent debtor appear, there may be a personal decree against him, though the attachment has not been sued out or levied; or after his appearance the attachment may be sued out and his effects subjected. *Ibid.*

20. A decree procured by fraud against an absent defendant, after his death and without suggesting his death, or reviving the suit against his representative or heirs, shall not stand confirmed after the lapse of seven years,† but may be set aside upon a bill against the heirs at law of the party procuring the decree. The Stat. 1 Rev. Code, p. 475-6, § 4, does not apply to such a case. *Evans et als v. Spurgins et als*, 11 Grat. 615.

---

## ACCOMPLICES.

1. The confessions or admissions of an accomplice, in a felony, made *after the commission and completion of the offence*, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice, to commit the felony, has been proved. *Hunter's case*, 7 Grat. 641.

---

## ACCOUNT.

1. The Court of Appeals will not reverse a decree against distributees, because no account of administration was taken, where the administrator has answered that he has no assets in his hands and knows of none that may come to his hands. *Harston et als. v. Medley*, 1 Grat. 96.

\* See No. 13.

† See Code of Va., ch. 170. § 13.

2. Testator leaves a will requiring that the balance of his slaves (a portion of them having been previously disposed of in his will) to be equally divided among his children, or their value: *Held*, 1. That the children must account for the slaves delivered to them, and their increase, as of their value at the time of the division of the estate, or if any of the slaves have been sold and the value at the time of the division cannot be ascertained, then for their value at the time of the sale. 2. If any of the slaves delivered to the children have died, the loss is to be borne by the estate. *Kean v. Welsh et als.*, 1 Grat. 403.

3. The sureties of an administrator of a surety of an administrator, are not entitled to have a resettlement of the administration accounts of the last mentioned administrator, upon his intestate's estate, which have been before settled, in a suit by creditors and distributees of said intestate, against his administrator and sureties, before the sureties asking the settlement of the accounts were made parties defendant in the cause. *Cookus et als. v. Peyton's Ex'or et als.*, 1 Grat. 432.

4. An error appearing upon the face of a commissioner's report will be corrected by the Appellate Court, though not excepted to in the court below. *Ibid.*

5. In a settlement of a guardian's accounts, of several wards, they should be stated separately, at least from the time when their expenses differed in amount. *Armstrong's heirs v. Walkup et als.*, 9 Grat. 372.

---

## ACTIONS.

1. A party having covenanted to do two things, one of which he has done, the court in order to effect justice, construed the covenants to be independent, and allowed the plaintiff to maintain his action for the part done; though the defendant may set up any injury, by reason of the failure of the plaintiff to perform any of the acts he had covenanted to perform, as a defence *pro tanto* to the action. *Todds v. Summers*, 2 Grat. 167.\*

2. W., professing to act as agent, purchases goods; they are sent to him with an invoice made out against his professed principal M., and forwarded to M. The seller informs M. of these facts and demands payment; and before M. pays for the goods, brings suit against him. *Held*, He may maintain his action. *Downer & Co. v. Morrison*, 2 Grat. 237.

3. An action cannot be maintained to recover money lent, to be bet upon an election. *Machir v. Moore*, 2 Grat. 257.

4. A party having a legal title to and having had possession of a slave,

\* See Code of Va., ch. 172, § 5, *et seq.*

though fraudulently acquired, may maintain an action against any third person aiding said slave to escape. *Law v. Law*, 2 Grat. 366.

5. An action may be maintained on a parol contract for the sale of a slave, although there is a bill of sale, under seal, executed for the slave, stating only a part of the parol contract. *Brent v. Richards*, 2 Grat. 539.

6. In trespass *quare clausum fregit*, the charge in the declaration, that the defendant ejected the plaintiff on a certain day, and kept him so ejected "for a long time, viz: from thence hitherto," held good on demurrer. *Bailey v. Butcher*, 6 Grat. 144.

7. A joint action of trespass, assault and battery lies against husband and wife, for an assault committed jointly by both. *Roadcap and Wife v. Sipe*, 6 Grat. 213.

8. In a joint action of assault and battery against husband and wife for a joint assault, there may be a verdict and judgment against the one and in favor of the other. *Ibid.*

9. A sum of money claimed by A. and B., to be ratably divided between them, is paid to them jointly, and ratably divided between themselves. C. is entitled to a portion of the money instead of B., and thereby A.'s proportion will be lessened. C.'s remedy is against each separately, and not jointly, for the amount received by each, to which he is entitled. *Moffett v. Bowman*, 6 Grat. 219.

10. Services performed with a view to a legacy, though not generally the ground of an action, become so, if performed at the request of the testator, or if he has promised to pay for the services, either before or after they were performed. *Jincey et als. v. Winfield's Adm'r et als.*, 9 Grat. 708.

11. A party who has been guilty of any fraud or illegal conduct in the transaction, cannot recover back money which he has paid upon a contract, which has been wholly rescinded, or the consideration of which has wholly failed. *Johnson's Ex'x v. Jennings' Adm'r*, 10 Grat. 1.

12. A remainderman, not having the right of possession of a slave at the time it is sold by the tenant for life, cannot maintain trover for its recovery. *Phillips et als. v. Martiney's Ex'or*, 10 Grat. 333.

13. An insolvent debtor, N., purchases slaves at a public sale, pays for them through another and has the receipt taken in the name of, and the slaves delivered to his sister, an infant, living with her father. N., afterwards, took the insolvent debtor's oath, on a *ca. sa.*, and the sheriff brought separate actions of detinue against the father and sister to recover the slaves. *Held*, 1st. Though N. never had possession of the slaves, but they were transferred by a fraudulent arrangement to a third person, the sheriff may recover them from the third person. 2d. Though the sister,

to whom the slaves were delivered, was an infant at the time when the action was instituted, yet as she did not set up the infancy to defeat the action, and as it may reasonably be inferred from the evidence that she was of full age, when the cause was heard upon a demurrer to the evidence, and appeared and defended herself by counsel, she is bound by the judgment. 3d. Though the slaves were sent to and remained upon the premises of the father, yet, as his daughter lived with him and claimed the slaves and he did not, the action cannot be maintained against him. *B. Staton v. Pitman, Sheriff; Pitman, Sheriff v. R. Staton*, 11 Grat. 99.

14. An action on the case for fraud, in selling an unsound slave to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty of soundness; or of a fraudulent concealment of the unsoundness of the slave, cannot be maintained against the personal representative of the vendor; and if there be judgment in such an action in favor of the plaintiff, the error will not be cured by the statute of Jeofails. 1 Rev. Code, 1819, ch. 128, § 103, p. 511. *Boyle's Adm'r v. Overby*, 11 Grat. 202.\*

15. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant; for an action is misconceived in the sense of the statute of Jeofails, only in a case where, upon the trial, the proofs show a cause of action, fit to be asserted, in a form different from that adopted. The defendant, then, is held liable, upon proof of a liability, and if no objection is made to the form of action, until after verdict, the defect in the form of action is cured thereby. *Ibid.*

16. The statute of Jeofails, though it will aid defects, whether of form or substance in pleading, where a portion of the matter pleaded is appropriate, does not apply to cases in which the matter pleaded is, in all its parts, merely nugatory, setting forth no cause of action, or no ground of defence. *Ibid.*

17. A personal representative cannot be sued as such for services, or goods furnished to his testator's or intestate's estate, since his death. *Fitzhugh's Ex'or v. G. Fitzhugh*, 11 Grat. 300.

18. It seems that an action will not lie against the personal representative, as such, for the funeral expenses of his testator or intestate. *Ibid.*

19. Where the demand, in all the counts of a declaration is such, that an action cannot, in any case, be sustained upon them, against the personal representative as such, then the description of him as such, may be treated as surplusage, and the judgment may be against him personally. *Ibid.*

20. But if the demand set out in one of the counts, may possibly be maintained against the personal representative as such, then the descrip-

\* See Code of Va., ch. 130, § 19, *et seq.*

tion of him as such, cannot be regarded as surplusage, and if the action cannot be maintained against him in his representative capacity, it must fail. *Ibid.*

21. In some cases where money has been paid for a deceased person, an action for money paid will lie against the personal representative as such: as where money has been paid as joint security. *Ibid.*

22. An action may be maintained at common law by a legatee, for the recovery of his legacy, against an executor who has assented to the legacy and waived a refunding bond. But the intention to dispense with the refunding bond must be very clear. *Nelson's Adm'r v. Cornwell*, 11 Grat. 724.

---

## ADMINISTRATION.

1. The sentence of a court of probat, fairly obtained and pronounced upon the merits, in a case in which a paper, propounded as a will by the nominated executor, is rejected, some of the next of kin interested to defeat it, being parties defendant, is conclusively binding upon a legatee in said paper, though he was an infant at the time and no party to the proceedings. *Wills v. Spraggins*, 3 Grat. 555.\*

2. The court granting administration, or admitting an executor to qualify as such, has a discretion in regard to the amount of the security. And the general practice of requiring security in double the estimated value of the estate, is a proper exercise of that discretion. *Atkinson v. Christian*, 3 Grat. 448.

3. The court granting administration or probat, originally, alone has authority to take additional security, when it may be required. And if it is directed in an appellate court, the order is directory only to the court granting the administration or probat. *Ibid.*

4. The other good security, which the court is authorized to require by the 41st sec., ch. 104, 1 Rev. Code, is not in lieu of the former security, but in addition thereto, and both are bound. *Ibid.*

5. In determining the amount, for which other good security ought to be required, regard ought to be had to the value of the estate remaining unadministered, including any accession thereto, beyond the original estimate thereof, and to the extent of the available security, still furnished by the original bond. *Ibid.*

6. A husband who has relinquished his marital rights to his wife's

\* See Code of Va., ch. 122, § 129, *et seq.*

property, is not entitled to administer upon her estate. *Charles v. Charles*, 8 Grat. 486.

7. The principles upon which, and the order in which, real and personal property will be applied to the payment of debts. *Elliott v. Carter et als.*, 9 Grat. 541.\*

8. Where all a testator's property is charged with the payment of debts, devisees must contribute ratably with legatees. *Ibid.*\*

See PERSONAL REPRESENTATIVE.

---

## ADMINISTRATOR.

See PERSONAL REPRESENTATIVE.

---

## ADMISSIONS.

1. A paper signed during the life-time of an intestate, (and not appearing to have been signed as agent of the intestate,) by one who afterwards becomes his administrator, cannot be read as evidence, in a suit against the administrator, as the admission of a party on the record. *Gaines' Adm'r v. Alexander*, 7 Grat. 257.

2. The admissions of an accomplice in a felony, made *after the commission and completion of the offence*, are not competent evidence against a prisoner, even though a previous conspiracy and combination, between the prisoner and the accomplice, to commit the felony, has been proved. *Hunter's Case*, 7 Grat. 641.

3. In an action of debt, under the plea of payment, the defendant may give in evidence the parol admissions of the plaintiff, that but a portion of the debt claimed is actually due. *Rice's Ex'or v. Aunatt's Adm'r*, 8 Grat. 557.

---

## ABATEMENT.

1. A plea in abatement to the jurisdiction of the court, on the ground that the defendant did not reside, nor the cause of action arise in the county where the suit was brought, is defective unless it state the residence of the defendant, and where the cause of action did arise. *Middleton v. Pinnell*, 2 Grat. 202.

2. If an heir is sued, before proceedings are had against the personal

\* See Code of Va., ch. 130, § 25, *et seq.*



representative, he must take the objection by plea in abatement.. *Rogers v. Denham's heirs*, 2 Grat. 200.

3. In a plea in abatement of a former action, there must be an averment of the pendency of the action at the time of the filing of the plea. *Archer v. Ward*, 9 Grat. 622.

See PLEADING.

## ADULTERY AND FORNICATION.\*

1. Adultery and fornication, committed with a slave, is a violation of the act 1 Rev. Code, ch. 141, § 6. *Jones' case*, 2 Grat. 555.

2. Simple incontinence is not punishable at common law. *Ibid.*

3. Illicit intercourse, between an unmarried man and a married woman, is fornication in the man. *Lafferty's case*, 6 Grat. 672.

4. An indictment for lewd and lascivious cohabitation, charging the offence from a day prior to the day when the statute went into effect, but as continuing to a day after the commencement of the act, is good. *Nichols and Janes' case*, 7 Grat. 589.

5. The act 1 Rev. Code, ch. 141, § 6, p. 555, which makes the oaths of two credible witnesses necessary to a conviction in a case of adultery and fornication, is repealed by ch. 27, § 2, p. 164, of the Criminal Code, Sess. acts, 1847-8. *Cregor's case*, 7 Grat. 591.

6. One credible witness is now sufficient to authorize a conviction for adultery or fornication. *Ibid.*

## AD QUOD DAMNUM.†

1. On application for leave to erect a mill, or other machine, the petitioner must show he has proceeded in the mode prescribed by law to suit his particular case. *Whitworth and wife v. Puckett*, 2 Grat. 528.

2. If the party applying for leave to erect a mill, owns the land on only one side of the stream, the proceeding should be under the 1st, 2d and 3d sec. of the act, 2 Rev. Code, ch. 235; and if, in such case, he proceeds under the 4th sec., the court should quash the writ and inquisition. *Ibid.*

3. If it appears upon the hearing of the case before the court, that a

\* See Code of Va. ch. 796, § 6.

† See Code of Va., ch. 63.

greater quantity of the land of the adjoining proprietors will be overflowed than the jury estimated, the inquisition should be quashed and a new writ directed issue. *I id.*

4. The court has no authority to increase or diminish the damages to the adjoining proprietors, assessed by the jury. *Ibid.*

5. The applicant for leave to build a mill, or other machine, is not entitled to the ownership of the land overflowed by the erection of the dam, upon paying the damages assessed by the jury. *Ibid.*

---

## ADVANCEMENT.

1. A father conveys to a child a tract of land in fee, subject to the father's life estate. In bringing this advancement into hotchpot on the partition of the father's estate. *Quære*: If the advancement is to be valued as at the date of the conveyance, or at the death of the father. *Chin et als. v. Murray et als.*, 4 Grat. 348.

2. Bonds of a legatee, given to him by his testator after the making of the will, as a *donatio mortis causa*, with the intention that the legatee shall not account for them, are not an advancement in satisfaction of his legacy. *Lee's Ex'or v. Boak*, 11 Grat. 182.\*

---

## ADVERSARY POSSESSION.†

1. The demandants in a writ of right, claiming title to land, under a patent from the commonwealth, are entitled to recover the land, though neither they, nor those under whom they claim, have entered and held actual possession under their grant, in the absence of a sufficient legal defence on the part of the tenant. *Taylor's devisees v. Burnsides*, 1 Grat. 166.

2. If the tenant in the writ of right would protect himself, by the plea of the statute of limitations, he must show that he entered on the land in controversy, claiming the same under his junior grant, when the demandants had not actual possession thereof, under their elder patent, and took and held actual possession thereof by residence, improvement, cultivation or other open, notorious and habitual acts of ownership; and so continued the same, under his claim, for more than twenty-five years before the commencement of the demandant's suit. *Ibid.*

3. The possession of the tenant, or those under whom he claims, must have been continuous, and if they have abandoned their possession within

\* See Code of Va., ch. 122, § 12. *Idem*, ch. 124, § 15.

† See Code of Va., ch. 135. *Idem*, ch. 135, § 38.

the twenty-five years, the statute of limitations is no bar to the demandants title under his elder patent. *Ibid.*

4. The tenant cannot sustain his defence of continued adversary possession, so as to make the statute a bar, if the demandants, or those under whom they claim, have, within the period of twenty-five years, before bringing the action, entered upon the land in controversy, and taken actual possession thereof, by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership. *Ibid.*

5. The entry of the demandant (or those under whom he claims) upon, and possession of, the land within his elder grant, not embraced by the junior grant of the tenant, cannot oust the tenant, if at the time of the entry of the demandant, the tenant had actual possession of the land embraced by his grant. *Ibid.*

6. *Quære*, If the entry of the demandant under the elder grant upon land not embraced by the junior grant of the tenant, will limit the junior patentee's adversary possession to his actual close. *Ibid.*

7. To constitute an adversary possession of land, there must be an actual occupation of some part of the land in controversy; or the use or enjoyment of some part thereof, by acts of ownership equivalent to such actual occupation. *Overton's heirs v. Davisson*, 1 Grat. 211.

8. When land, which is the subject of controversy, is embraced by conflicting grants from the commonwealth to different persons, and the junior patentee enters thereupon, and takes and holds actual possession of any part thereof, claiming title to the whole under his grant; such adversary possession of part of the land in controversy, is an adversary possession of the whole, to the extent of the limits of the younger patent; and to that extent is an ouster of the seizin or possession of the elder patentee, if the latter has no actual possession of any part of the land within the limits of his grant. *Ibid.*

9. In the case last stated, if the elder patentee is in the actual possession of any part of the land in controversy at the time of the entry thereon by the junior patentee, then the latter can gain no adversary possession, beyond the limits of his mere enclosure, without an actual ouster of the elder patentee from the whole of the land in controversy. *Ibid.*

10. Upon the question of adversary possession, it is immaterial, whether the land in controversy is embraced by one or several coterminous grants of the elder or younger patentee; in either case, the land granted to the same person, by several patents, is to be regarded as forming one entire tract. *Ibid.*

11. *Quære*, Whether the possession of the junior patentee will be limited to his enclosure, by the actual possession of the elder patentee

of a part of the land embraced in his grant, not embraced within the limits of the grant to the junior patentee. *Ibid.*

12. To constitute an adversary possession of land, there must be an actual occupation of some part of the land in controversy; or the use or enjoyment of some part thereof, by acts of ownership equivalent to such actual occupation. And such adversary possession cannot be acquired by the open exercise of acts of ownership over the same, falling short of such actual occupation, use, or enjoyment. *Ibid.*

13. While patented lands remain in a state of nature, they are not susceptible of a disseizin or ouster of, or adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition. *Ibid.*

14. A possession of land not held under a grant from the commonwealth, prior to the emanation of a patent therefor to a third person, cannot constitute an adversary possession thereof. *Ibid.*

15. The elder patent of the commonwealth confers seizin of the land embraced therein, though, at the time of its emanation, there was an actual occupation of the land by another person. *Ibid.*

16. In a controversy between parties claiming land under the elder and junior patentee, the party claiming under the latter, to protect his possession by the defence of the statute of limitations, must show an actual possession of the lands in controversy, *since* the emanation of the elder patent, for the period limited by the statute of limitations. *Ibid.*

17. If the possession of the tenant in possession was sufficient to bar the action of the ancestor of the demandants, at the time of his death, it is sufficient to bar the action of his heirs. *Ibid.*

18. The possession of one coparcener or tenant in common, being the possession of all, no *one* in possession of the whole subject can avail himself of such possession, as a defence under the statute of limitations, against the rest, without an actual disseizin or ouster of the others. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

19. Though a great lapse of time, with other circumstances, may warrant the presumption of a disseizin or ouster, by one tenant in common or coparcener, of another not laboring under disabilities, this presumption is a matter of evidence for the consideration of the jury, and not a question of law for the decision of the court upon a special verdict. *Ibid.*

20. A special verdict in a writ of right, where the defence is the statute of limitations, must find either an actual disseizin or ouster of the demandants or those under whom they claim, or facts which in law constitute such actual disseizin or ouster. *Ibid.*

21. There can be no adversary possession against the commonwealth, and therefore a junior patentee cannot go behind the elder for the purpose of giving color to his possession prior thereto, but may go behind the elder patent for the purpose of giving color to his possession from, or subsequently to, the granting of the elder patent. *Shanks et als. v. Lancaster*, 5 Grat. 111.

22. It is immaterial whether an adversary possession, under claim of title, be under a good, bad, legal, or equitable title. *Ibid.*

23. A temporary possession of land, by cutting and sawing timber upon it, is not such adversary possession as will give title. *Pasley v. English et als.*, 5 Grat. 141.

24. Land was sold by commissioners under a decree, in 1807, and a deed given by them (the purchase money having been paid) to the purchaser; in 1835, the commissioners returned their report, which was confirmed in 1836, though the death of the former had not been suggested; the land having been all the time in the possession of the original owner and those holding under him. The devisee of the purchaser then brought a writ of right to recover the land. *Held*: The possession of the original owner and those claiming under him, from the time of the sale to the confirmation of the report, was not an adversary possession. *Evans and wife v. Spurgin*, 6 Grat. 109.

25. A. conveys land in trust to secure a debt, and subsequently sells a part of the land to H., and gives him a title bond, and H. takes possession. The land is afterwards sold under the trust deed and H. continues to hold. The possession by A., after the deed, was as tenant by sufferance; and the possession of H. was of the same character; and, therefore, the statute of limitations is no bar in an action, by the purchaser under the trust deed, for the recovery of the land; no actual ouster or disclaimer by H. being proved. *Creigh's heirs v. Henson*, 10 Grat. 231.

26. An open, exclusive, and uninterrupted possession of property, held under a parol gift, (for a life not yet terminated,) from a plaintiff in ejectment, is no bar to his recovery in that action. *Clark v. McClure*, 10 Grat. 305.

27. As a general rule, possession to give title, must not only be adversary, but adverse in its inception; and where a defendant has entered under a plaintiff, and acknowledged his title as that under which he holds, he cannot controvert it. *Ibid.*

28. An adverse possession depends upon the intention with which the possession was taken and held. Wherever the act itself imports that there is a superior title in another, by whose permission and in subordination to whose still continuing and subsisting title the entry is made, such entry cannot be adverse to the owner of the legal title; and such

possession, so commencing, cannot be converted into an adverse possession, except by disclaimer, the assertion of an adverse title and notice. *Ibid.*

29. A vendee who enters under an executory contract, which leaves the title where it was and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the mean time. And in such case, as in the case of lessee, mortgagor, *cestui que trust* and the like, where one is under the owner of the legal title, a privity exists between them, which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute of limitations. *Ibid.*

30. An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift, is, in its nature, a recognition of the continued existence of a subsisting title in the legal owner; and a claim to hold any estate in land by virtue of a parol gift from the legal owner, is a claim to hold in subordination to his legal title. *Ibid.*

31. A junior patentee files his bill against a senior patentee, claiming land covered by both patents, and there is a decree sustaining his claim and directing a conveyance by the senior patentee; but it is never executed. The junior patentee occupies a part of his patent, though not that part included in both patents, and holds possession for many years. *Held*: That the junior patentee and those claiming under him have adversary possession to the bounds of his patent. *Anderson v. Harvey's heirs*, 10 Grat. 386.

32. A purchaser under the elder patentee cuts the wood upon the interlock and converts it into coal upon the land, and removes and uses it. This temporary possession did not disseize the heirs of the junior patentee. *Ibid.*

33. After the forfeiture of land to the commonwealth, under the delinquent land law, Sess. acts 1834-5, p. 11, no possession thereof, adverse to the proprietor in whose name it was forfeited, can run against the commonwealth. *Staats v. Board*, 10 Grat. 400. *Wild's lessee v. Serpell, idem.* 405.

34. *Quære*, Whether after the lien of the commonwealth, for taxes attaches to lands, any possession adverse to the proprietor, can impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes; and as a consequence, to transfer to a purchaser or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands. *Staats v. Board*, 10 Grat. 400.

35. Though the deed, executed by the sheriff for land sold for taxes, be defective, it is competent evidence to show, with other evidence, an actual entry, under a claim of title and a continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed, might ripen into a right of

possession, and so bar the right of entry of the opposing party. *Flannagan v. Grimme et als.*, 10 Grat. 421.

36. The actual possession of land, claiming the same adversely, does not prevent the operation of the deed made by a commissioner of delinquent and forfeited lands, conveying to a purchaser the commonwealth's right to the land. *Smith et als. v. Chapman*, 10 Grat. 445.

37. A slave is conveyed to a step-son for value, by deed, the step-father retaining possession of the slave and her increase for many years; such possession is not adversary and does not afford him the protection of the statute of limitations. *Roberts v. King*, 10 Grat. 184.

38. In a writ of right, the tenant, in order to defend his position under the statute of limitations, may show a possession anterior to his patent; and to show color of title, may introduce the entry and survey, upon which his patent issued. But as there cannot be an adversary possession against the commonwealth, he cannot show possession further back than a senior grant of the same property. *Koiner v. Rankin's heirs*, 11 Grat. 420.\*

39. The effect of a patent issued upon an inclusive survey, and the right of a tenant claiming under it, to show possession under color of title, is the same as in other grants. He may give in evidence the entries for the different tracts, embraced in the inclusive survey, and the survey made in pursuance of the order. But he cannot show possession further back than the senior grant. *Ibid.*

40. To protect himself under the statute of limitations, the tenant must show continued adversary possession for the time of limitation of some part of the land in controversy. Actual possession of a part of his land, outside of the boundaries of the demandant's elder patent, is not sufficient. *Ibid.*

41. When patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patent, unless by acts of ownership, effecting a change in their condition. *Ibid.*

42. A senior patentee holds and cultivates a portion of his tract, not embraced in a junior patent. The junior patentee afterwards takes possession and clears and cultivates a part of his tract outside of the portion embraced by both patents, and also clears and encloses a portion of the interlock, and exercises such acts of ownership over the whole as constitutes adversary possession; and after five years, dies. The possession of the heirs is not limited to their enclosure. The entry of the senior patentee upon the heirs is tolled, and he cannot recover by a warrant of unlawful detainer. *Kinchloe v. Tracewells*, 11 Grat. 587.

43. An entry upon land in the possession of another, must be with claim

\* See *ante*, No. 21.

of title in order to constitute an ouster and give adversary possession to the party entering. But the claim of title need not be under a deed or other writing; or if it be under a deed, it is not necessary that the possession shall be restricted to what shall prove to be within the precise boundaries of the deed. *Ibid.*

44. If possession be taken, under a mistake as to the true boundary, the fact is immaterial in a proceeding for an unlawful entry and detainer. *Ibid.*

45. One of several heirs, took possession of land, claiming that it was devised to him for life, remainder to his sons, by his father, by a will that was lost, and he held it for his life and his sons, and those claiming under them held it after his death, claiming under this title. This taking and holding possession was adverse to the other heirs; and the statute of limitations commenced to run from the time of such taking possession. *Caperton et al. v. Gregory et als.*, 11 Grat. 505.

---

### AFFIDAVIT.

1. The affidavit of a witness, of his inability to attend the court, not having been objected to in the court below for want of notice; that objection cannot be made in the appellate court. *Taylor v. Smith*, 10 Grat. 557.

2. Such affidavit is sufficient to authorize his deposition, which has been taken, *de bene esse*, to be read as evidence. *Ibid.*

---

### AMENDMENTS.\*

1. A sheriff will be permitted to amend his return on an execution, after an action has been commenced, by the plaintiff in the execution, against the sheriff and his sureties on his official bond, founded on said return. *Wardsworth, &c. v. Miller, &c.*, 4 Grat. 99.

2. In a proper case, the court may permit the attorney for the commonwealth to amend his information after a demurrer thereto; but this should not be done where the offence charged in the presentment, upon which the information is based, does not amount to a misdemeanor. *Williamsons case*, 4 Grat. 555.

3. It being necessary to plead a custom and acquiescence therein, *speci-ally*, as a defence to an action, and the proof thereof having been admitted on the general issue, on the first trial, without objection by the plaintiff;

\* See Code of Va., ch. 171, § 14. *Idem*, ch. 177, § 7. *Idem*, ch. 181, § 5.



the defendant will be allowed to amend his pleadings, on the return of the case from the appellate court and plead the matter specially. *Governor for Liggatt v. Withers*, 5 Grat. 24.

4. An action is brought on a bond for \$188, which is declared on as for \$108; the defendant confesses judgment for the debt in the declaration mentioned and the judgment is entered for \$108. This is not a clerical error which can be amended under the 108th sec. of the stat. of *Jeofails*, 1 Rev. Code, ch. 128, p. 512. *Compton v. Cline*, 5 Grat. 137.

5. A demurrer to a declaration is overruled; the case tried on the issues joined on pleas, verdict and judgment for plaintiff. On appeal, the judgment is reversed, verdict set aside and the demurrer sustained. The cause remanded for a new trial, with liberty to the plaintiff to amend his declaration. *White's Adm'x v. Toncray*, 5 Grat. 180.

6. By mistake, a wrong name is inserted in an indictment for a misdemeanor, though the record of the court and the endorsement on the indictment show the right name. The indictment cannot be amended by striking out the wrong name and inserting the name of the person intended. *Buzzard's case*, 5 Grat. 694.

7. In an action against an executor on a note, signed by him as such, there is a judgment by default, *de bonis propriis*. If this is error, it is to be corrected by motion to the court, and not by appeal. *Snead v. Colman and wife*, 7 Grat. 300.

8. A replication to a plea, relies on a covenant, but fails to make *profert* of it; and is demurred to and the demurrer is sustained on this ground. It is proper to allow the plaintiff to amend the replication, by adding the *profert* of the covenant. *Bowles' Ex'or v. Elmore's Adm'x*, 7 Grat. 385.

9. An indictment for a wilful trespass, was against J. M. It was endorsed by the grand jury as against T. M. "a true bill," and so it was noted on the record. The court cannot alter the record, so as to make it conform to the indictment. *McKinney's case*, 8 Grat. 589.

10. Defendant in equity allowed to amend his answer in order to plead the statute of limitations. But the statute of limitations being sustained as to certain open accounts, part of plaintiff's claim, the defendant's claims of the same nature, not allowed to be set off against plaintiff's specialty claim. *White v. Turner's Adm'r*, 2 Grat. 502.

11. *Quære*, If the act, Code of Va., ch. 181, § 5, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony. *Powell's case*, 11 Grat. 822.

12. The amendments authorized by the act, are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or upon evidence *aliunde*. And the amendments

authorized, are amendments to support the judgment, not amendments to give ground for reversing it. *Ibid.*

---

## ANNUITIES.

1. Interest will not be allowed, on the arrears of an annuity, which was to be paid in agricultural products, at a particular place, the value of which was to be ascertained by testimony, and in the absence of any proof of demand, at the place where it was to be paid, or of an agreement to dispense with the demand and convert the same into money. *Phillips et als. v. Williams et als.*, 5 Grat. 259.

2. Land on which the annuity is a charge, having been sold during the pendency of the suit, it will be decreed to be sold to satisfy the arrears of the annuity, without noticing the *pendente lite* purchaser. *Ibid.*

---

## ANSWER.

1. Defendant's demurrer to a bill, being overruled, he may file any sufficient answer. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. An answer to a bill of discovery is sufficient, when it shows that the defendant is protected from making the discovery sought by the bill. *Ibid.*

3. If the objection to a discovery does not appear on the face of the bill, the defendant may claim his protection by plea or answer, the averments of which if traversed by replication, must be established by sufficient evidence. *Ibid.*

4. Defendant in equity allowed to amend his answer in order to plead the statute of limitations. *White v. Turner's Adm'r*, 2 Grat. 502.

5. A defendant, though in default for want of an answer, ought to be permitted to file any proper answer at any time before a final decree, but the trial of the cause is not thereby to be delayed, unless for good cause shown. *Bowles v. Woodson*, 6 Grat. 78.

6. A defendant who is in default for want of an answer, and files a demurrer to the bill which is overruled, is not entitled to two months, in which to file his answer. *Reynolds v. The Bank of Va.*, 6 Grat. 174.

7. When a plaintiff comes into a court of equity for a discovery, the whole answer of the defendant is to be read, if it is used at all, as the testimony of a witness; and no part of it, pertinent to the discovery, is to be rejected, because it is affirmative matter in avoidance of that which is

admitted to be true. But though the answer is to be read, it is subject to be discredited in the same manner as the testimony of any other witness. *Lyons v. Miller*, 6 Grat. 427.

8. It is the right of a defendant in equity to file his answer at any time before a final decree. *Bean et al. v. Simmons*, 9 Grat. 389.

9. Where the court had received the case when submitted for decision; had examined and settled the terms of a decree, deciding the principles of the cause, though it was an interlocutory decree, and a decree had been prepared and considered by the court, and directed to be entered in the order book, but before it had been entered and on the same day it was directed to be entered a defendant tendered his answer. *Held*, the defendant was then entitled to file his answer. *Ibid*.

10. *Quære*, Whether, if the decree had been entered in the order book and the orders had been signed by the judge, the defendant would have been entitled, at the same term, or at any time previous to the final hearing of the cause, to file his answer. *Ibid*.

11. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice, discretionary with the court and not a subject of appeal. *Craig v. Sebrell*, 9 Grat. 131.

12. The exception being sustained and the defendant having filed another answer, there the subject of the exception properly ended. *Ibid*.

13. Plaintiff, after setting out his case, in his bill, states what he understands is the pretension of the defendant. This is not such an allegation, as will constitute the answer responsive thereto, evidence, and thus throw the burden of disproving it upon the plaintiff. *Lea's Ex'or v. Eidson*, 9 Grat. 277.

---

## APPEALS.\*

1. During the pendency of a cause in a court of equity, against the distributees of an intestate debtor, by his creditor, the estate of the debtor is committed to the sheriff; who without an amendment of the bill, or the issue of process against him, comes in and files his answer; and no objection is taken to his so doing in the court below. The Appellate Court will not reverse a decree against the distributees on that account. *Hairston v. Medley*, 1 Grat. 96.

2. An administrator of an intestate, who lived and died in another state, answers that he has no assets in his hands; and knows of none that can come to his hands. The court will not reverse a decree against the distributees, because no account of this administration was taken. *Ibid*.

\* See Code of Va., ch. 181., also Scss. Acts 1852, ch. 61, 62.

3. A bill is filed in which one, who is a necessary party, is not made a defendant; a decree is obtained affecting him. He then files his bill against the plaintiff in the first suit, to enjoin his decree, and to this bill of injunction, the plaintiff in the first suit answers, and by the bills and answers in both suits, the respective claims of the parties are fully presented. The causes come on to be heard together in the court below and a decree is made, from which there is an appeal. The Appellate Court will consider the bill of injunction as an answer and cross bill in the first cause, and decide the case upon the merits; without sending the causes back for an answer in the first suit. *Kyle's Ex'or v. Kyle*, 1 Grat. 526.

4. A copy of an account from the partnership books, being filed with the answer of the executor of one of the partners, and being treated as evidence on the hearing in the court below, will be so considered in the Appellate Court. *Ibid.*

5. An error appearing on the face of a commissioner's report will be corrected, though no exception has been taken to it, in the court below. *Cookus v. Peyton's Ex'or*, 1 Grat. 431.

6. In a controversy, arising out of the probat of a will in the court below, the contestants admit upon the record, that the paper has been duly executed by the testator; and that he was of sound and disposing mind and memory at the time of its execution. The Appellate Court being of opinion that this admission does not dispense with the legal proof of these facts, will send the cause back to the court below, to give the propounders an opportunity to produce the proofs. *Hylton v. Hylton*, 1 Grat. 161.

7. A commissioner's report is excepted to and the court, without passing upon the exceptions, re-commits the report. The re-committed report is not excepted to. The exceptions to the first report are waived and are not a subject of consideration in the Appellate Court. *Kee's Ex'ors v. Kee's creditors*, 2 Grat. 116.

8. No exception having been taken to the rejection of a plea, offered by the defendant in the court below, the propriety of rejecting the plea cannot be considered in the Appellate Court. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

9. This court will presume that a deposition has been taken upon a regular commission and notice, where no objection has been taken to it, on the ground of being deficient in that respect, in the court below. *Polard's heirs v. Lively*, 2 Grat. 216.

10. An exception to the admission of a disposition as evidence for an irregularity in taking it, must state the grounds of the objection or this court will not notice it. *Barker v. Barker's Adm'r*, 2 Grat. 344.

11. A bill of exceptions to the opinion of the court below, refusing a

new trial, does not state that the objection was taken to the damages as excessive. The objection cannot be made in the Appellate Court. *Law v. Law*, 2 Grat. 366.

12. When the case before the jury depends upon the credibility of witnesses, and the court below refuses to grant a new trial, the Appellate Court will not reverse the judgment. *Ibid.*

13. When a criminal case depends upon the tendency and weight of evidence, and the jury, and the judge who tried the cause, concur in the weight and influence to be given to it, it is an abuse of the powers of an Appellate Court, to set aside a verdict and judgment, because from the evidence as written, the Appellate Court would not have concurred in the verdict. *Hill's case*, 2 Grat. 594.

14. The General Court will only set aside a verdict, because it is contrary to the evidence, in a case where the jury have plainly decided against the evidence or without any. *Ibid.*

15. The Court of Appeals will reverse a decree for want of proper parties though the objection was not taken in the court below. *Taylor's Adm'r et als v. Spindle*, 2 Grat. 44.

16. A bill is filed by two executors against the creditors of their testator, for administration of his estate in equity. The accounts are taken, and the cause is ready for hearing, when one of the executors dies; without being revived against his representative, a decree is made against the surviving executor who appeals. It is too late to object in this court, that the suit was not revived against the representative of the deceased executor. *Kee's Ex'or v. Kee's creditors*, 2 Grat. 116.

17. The court below having given judgment for the plaintiff in a *scire facias*, against the bail, for too large an amount, the Appellate Court will reverse the judgment and give judgment for the proper sum. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

18. In a case of misdemeanor, after the plea of not guilty and a trial and verdict on that plea, it is not competent to arrest the judgment for any supposed variance between the information and presentment. *Jones' case*, 2 Grat. 555.

19. The court will arrest the judgment, if a material constituent of the offence, for which the prisoner is prosecuted, is omitted in the indictment. *Peas' case*, 2 Grat. 629.

20. Upon overruling a motion for a new trial, the court below certifies that the donor made an absolute parol gift of slaves to the donee. This is not sufficient to authorize an appellate court to infer the actual and continued possession of the slaves by the donee, or those claiming under him;

though such a certificate, as to other personal property, would be sufficient. *Anglin v. Bottom*, 3 Grat. 1.

21. Where a plaintiff in equity has shown no title to relief and his bill is dismissed, an Appellate Court will not reverse the decree, to enable him to introduce new parties and thereby make a new case upon the merits. *Jameson's Adm'x v. Deshields*, 3 Grat. 4.

22. If, however, plaintiff has shown title to relief, but there is a defect of parties, the decree will be reversed and sent back, to enable him to make the necessary parties. *Ibid.*

23. An instruction as to the sufficiency of evidence, upon a point, which is immaterial is not an error for which an Appellate Court will reverse the judgment of the court below. *Pitman v. Breckenridge and Crawford*, 3 Grat. 127.

24. In controversies concerning roads, no appeal or supersedeas lies to an interlocutory order of the County Court. *Trevillian v. Louisa R. R. Co.*, 3 Grat. 326. *Hancock v. Richmond and Petersburg R. R. Co.*, *Id.* 328.

25. Appeals, as of right, from orders of the County Court, in controversies concerning roads, only exist, where the controversy is concerning the establishment of a road, and not where it is a collateral controversy, concerning the damages occasioned by a road already established. *Hancock v. Richmond and Petersburg R. R. Co.*, 3 Grat. 328.

26. Bill filed to subject heirs to the payment of the bond of their ancestor, does not allege that the heirs are bound in the bond, but makes the bond an exhibit with the bill. The answer does not admit or deny that the heirs are bound in the bond, and before the cause is heard, the bond is lost out of the papers in the cause. There is proof of the existence of the bond, but no evidence on the question whether the heirs were bound by it; nor is that question made in the court below, but a decree is made against the heirs. *Held*: That although this court will reverse the decree, for the want of the proof that the heir is bound, the cause will be sent back to give the plaintiff an opportunity to amend his bill and show that the heir was bound in the bond. *Piper v. Douglass' Ex'or*, 3 Grat. 371.

27. An appeal lies, as of right, from the County to the Superior Court, from an order revoking absolutely or conditionally, the power of an executor or an administrator, with a view to the appointment in his stead, of an administrator *de bonis non*, or to the committing of the estate to the sheriff. *Atkinson v. Christian*, 3 Grat. 448.

28. An Appellate Court requiring an executor or administrator to give other security; the order should be directory only to the inferior court, which originally granted administration. *Ibid.*

29. The Court of Appeals, upon affirming a decree of the court below, which does not bear interest, will give damages at the rate of 6 *per cent. per annum*, upon the amount of the decree, exclusive of costs, from the time the decree took effect until paid. *Mulladay v. Machir's Adm'r*, 4 Grat. 1.

30. An administrator or executor may appeal without giving security for costs, when the object of the appeal is to assert the rights or protect the interests of the estate he represents. *McCauley's Adm'r v. Griffin's Ex'or*, 4 Grat. 9.

31. The death of a defendant in error in a proceeding of unlawful detainer, is suggested, pending an appeal by the plaintiff below. On motion to revive at the next term *Held*: That the cause is in its nature, incapable of revival, and that the writ of supersedeas be abated. *Chapman v. Dunlap*, 4 Grat. 86.

32. The act limiting appeals to the Court of Appeals, refers to the time of presenting the petition for an appeal to the court or a judge in vacation; and if the petition is presented within five years from the date of the judgment or decree, the appeal is not debarred by the statute. *Williamson v. Gayle et als.*, 4 Grat. 180.\*

33. After an appeal has been allowed, the appeal is pending in the Appellate Court, and the failure of the appellant to give the appeal bond, does not avoid the appeal. Such appeal can only be dismissed in the manner prescribed by the statute. *Ibid*.\*

34. If the appellant fail to give the appeal bond, the appellee may have a rule upon him, to compel him to give it. *Ibid*.

35. The appellee may proceed to enforce the judgment or decree of the court below, until the appeal bond is given. *Ibid*.

36. One of several appellants dies after an appeal is perfected in the Appellate Court. Either party may have the appeal revived in the name of the representative of the deceased party; and the party desiring to have it done, must do it. *Raine et als. v. Bank of Virginia*, 4 Grat. 150.

37. A curatrix having proceeded to administer the estate of an intestate, it will be presumed in the Appellate Court that she was appointed under the 42d sec. 1 Rev. Code, ch. 104. *Cross' curatrix v. Cross' legatees*, 4 Grat. 257.

38. An exception to the opinion of the court below must show its relevancy or the judgment will be presumed to be correct. *Carpenter and wife v. Utz et als.*, 4 Grat. 270.

39. In a suit by an administrator *de bonis non* against the representative of the first administrator, for a settlement of the first administrator's account of his administration, it is irregular to decree payment to the ad-

\* See Code of Va., ch. 182, § 17: and *Yarbrough v. Deshazo*, *post* p. 27, No. 64.

ministrator *de bonis non*. But the distributees, being parties to the suit and not complaining; so that a payment to the administrator *de bonis non*, would be a valid discharge to the representative of the first administrator, he will not be heard to complain of the irregularity, in the Appellate Court. *T. Morris' Adm'r v. Morris' Adm'r et als.*, 4 Grat. 294.

40. A motion to quash a writ and inquisition founded on a judgment at law, is sustained in the court below. The Appellate Court is at liberty to look into the judgment, writ and inquisition, though not incorporated into a bill of exception; inasmuch as they must of necessity have entered into the consideration of the court below and formed the basis of its judgment. *Wallop's Adm'r v. Scarburgh et als*, 5 Grat. 1.

41. Upon an appeal from a final decree made upon a report of a commissioner, to which there were various exceptions by the appellant, the Appellate Court holds that the court below erred in not sustaining one of the appellant's exceptions to the report and the decree is reversed and the cause remanded for new enquiries to be made in relation to the subject of that exception. *Held*, upon a second appeal that the subject of that exception is the only question left open and undetermined. *Deneufville's Adm'r v. Travis's Adm'r*, 5 Grat. 28.

42. In a suit by a judgment creditor to set aside a fraudulent conveyance of property by his debtor; the judgment and execution being admitted by the pleadings, the failure to file copies of them in the cause, is not ground of reversal of the decree of the court below, setting aside the conveyance. Especially, if no objection was taken in that court to the failure to file them. *McNews v. Smith*, 5 Grat. 84.

43. When a trial of a cause is had before a jury and they cannot agree upon a verdict, or do agree upon a verdict, which is set aside; and a new trial awarded, upon the new trial, any opinion expressed by the former jury or by the court upon the former trial, is improper for the consideration of the jury; and if an opinion or instruction of the court, given on a former trial is relied on before the jury on the second trial, by the party in whose favor it was given, without asking for such opinion or instruction from the court, and a verdict and judgment are rendered for him, the Appellate Court will consider the opinion or instruction so relied on; and if it is erroneous, will reverse the judgment and award a new trial. *Crawford v. Morris*, 5 Grat, 90.

44. On the trial of a joint action of trespass against several, who plead jointly, an instruction to the jury, that they may sever the damages and assess respectively what, in their opinion, each party found guilty ought to pay, is not an error of which a defendant can complain in an Appellate Court, though the plaintiff may. *Ibid*.

4.5 An exception to the opinion of the court, refusing a new trial, states all the *evidence* introduced on the trial, instead of the *facts proved*. The



Appellate Court cannot consider the parol evidence of the appellant, but if upon the written evidence, and the parol evidence of the appellee, the verdict was erroneous; the judgment will be reversed and a new trial awarded. *Pasley v. English et als.*, 5 Grat. 141.

46. A decree of partition is offered in evidence in the court below, as a necessary link in the chain of title. An objection that it has not been recorded in the county where the land lies,\* cannot be made in the Appellate Court, its introduction not having been objected to on that ground in the court below. *Wynn v. Harman's devisees*, 5 Grat. 157.

47. A decree affirmed in consequence of an equal division of the judges of the Court of Appeals, settles the principles of the cause, involved in the decree of the court below. *Phillips et als. v. Williams et als.*, 5 Grat. 259.

48. Upon an appeal from an interlocutory decree, the principles of the decree (and not the mere informalities in the form thereof) are the proper subjects of consideration in the Appellate Court. The decree will not be reversed for such mere error of form, but will be affirmed, without prejudice to the appellant's right to move the court below for a modification of the decree in these respects. *Woodson, trustee v. Perkins*, 5 Grat. 345.

49. A decree against an administrator being for 6 *per cent.* interest when it should have been for but 5 *per cent.*; and this appearing on the face of the report of a commissioner, which was the basis of a decree, and not being susceptible of being repelled by extrinsic evidence, it will be corrected by the Appellate Court, though not excepted to in the court below. *Wills' Adm'r v. Dunn's Adm'r*, 5 Grat. 384.

50. A commissioner's report, purporting to be made in obedience to the order of the court below, not having been excepted to and having been the basis of a decree; the Appellate Court must presume that the report was made by proper authority, although no order of account is in the record. *Ibid.*

51. Upon an issue, *devisavit vel non*, the verdict of the jury in favor of the will approved by the court, before which the issue is tried, concludes all mere questions of fact, depending upon the credit to be given to witnesses; and therefore, in such case, in an Appellate Court, it must be taken, that all the requirements of the statute, in order to establish the will were satisfactorily proved: and the identity of the paper is one of the facts, settled by the verdict. *Jessee et als. v. Parker's Adm'rs et als.*, 6 Grat. 57.

52. The act March 3d, 1835, Supp. Rev. Code, ch. 77, § 27, authorizes the county courts to dispense with the provisions, contained in the 1st and 2d sec. of that act, requiring the appointment of commissioners of roads,

\* See Code of Va., ch. 163, § 18, p. 632-3.

and to retain the mode of appointing viewers as prescribed by the act Feb. 2d, 1819. A county court professing to act under the act of 1819, in opening a road. It is not necessary, that the record of their proceedings shall shew that the county court had previously dispensed with the act 1835; and it will be presumed in the Appellate Court, that the County Court, professing to act under the act of 1819, so acted with lawful authority. *White v. Colman*, 6 Grat. 138.

53. A bill of exceptions to the opinion of the court below refusing to grant a new trial, because the verdict is contrary to the evidence, states all the evidence, both of plaintiff and defendant, instead of the facts proved. The appellate court will refuse to consider the question. *Forkner v. Stuart, &c.*, 6 Grat. 197. *Hansbarger's Adm'r v. Kinney*, *id.* 287.

54. A bill of exceptions to the opinion of the court below only states the facts which the evidence tends to prove. The Appellate Court taking the facts most strongly for the appellee, will consider whether the verdict and judgment are or are not correct. *Moffett v. Bowman*, 6 Grat. 219.

55. The judgment of the court below, so far as it affect an appellant, being confirmed; costs will be given to the appellee, as the party substantially prevailing; although so much of the judgment as affects a third party, who has not appealed, is reversed. *Harman v. Ordell*, 6 Grat. 207.

56. Where an instruction given by a court below, is erroneous, the Appellate Court cannot undertake to determine that the verdict is right, upon the evidence, and therefore to affirm the judgment; but a new trial must be awarded. *Wiley et als. v. Groins et als.*, 6 Grat. 277.

57. A bill of exchange being filed with the plaintiff's bill, as the foundation of his claim, there is a decree in his favor; no proof having been required of the making or endorsement. On appeal there can be no objection to the evidence for the want of this proof. *Anderson et als. v. De Soer*, 6 Grat. 363. *Same v. Gallego's Adm'r et als.*, *id.*

58. Two suits against the same defendants to subject the same fund, are carried on and heard together; and by the decree, the fund is directed to be divided between the two plaintiffs, one of whom appeals. This appeal brings up both cases and the Appellate Court may reverse the decree in both. *Ibid.*

59. A writ of error *coram nobis* does not lie in the Supreme Court of Appeals; and where a party, to a cause pending in that court, dies pending the appeal, it is not necessary to revive the cause, in the name of his representative; but the case may be revived when it goes back to the court below. *Reid's Adm'r v. Strider's Adm'r et als.*, 7 Grat. 76.

60. An appeal lies of right to the Circuit Court, from the judgment of a County Court, refusing to permit a person named as executor in a will,

to qualify, without giving security. *Fairfax v. Fairfax's Ex'or*, 7 Grat. 36.

61. A paper signed and endorsed in blank is filled up as a common promissory note, and value paid for it. Pending an action against the endorser, the endorsement is filled up as a guaranty. There is a judgment for the defendant on a case agreed, and on appeal, the judgment is reversed and a judgment given against him as an original surety, without sending the case back to have the endorsement erased and filled up as an original promise. *Orrick v. Colston*, 7 Grat. 189.

62. The Court of Appeals has no jurisdiction to grant a writ of error in a criminal case, or to a judgment upon an application for a writ of *habeas corpus*. *Bell v. the Commonwealth*,\* 7 Grat. 201.

63. The Code of Va., ch. 51, § 1, p. 660, provides that an Appellate Court shall take judicial notice of private or local acts, that appear to have been relied on in the court below. The judicial notice to be taken of such a law, is the same that is to be given to laws of a general and public nature and has reference to the hearing of the cause in the appellate forum, whether the cause is decided in the court below before or after the commencement of the Code. *Somerville v. Wimbush*, 7 Grat. 205.

64. The act, Code of Va., ch. 182, § 3, p. 683, provides that no petition shall be presented for an appeal from, or writ of error, or *supersedeas* to a judgment of a circuit or county court, where the matter in controversy is merely pecuniary and not of a greater amount than \$200. The act applies to cases decided before the act went into effect, where the application for the *supersedeas*, &c., is made since the act went into effect. *McGruder v. Lyons*, 7 Grat. 233.†

65. Upon an appeal to the Court of Appeals from a final judgment, decree or order, if the appeal bond is not given within five years from the date of said judgment, &c., the appeal will be dismissed. *Farborough and wife v. Deshazo*, 7 Grat. 374.

66. The proviso in the act for the limitation of suits, Code of Va., ch. 149, § 19, p. 540, as to rights when the Code took effect, is restricted to actions and rights barred by that chapter; and does not extend to the law limiting and regulating appeals. *Ibid*.

67. Where a plea, under the act of 1831, is filed and another is tendered, which only varies from the first in the amount of damages laid, or in asking to rescind the contract entirely; the rejection of this last by the court is not ground for reversing the judgment upon appeal, where the verdict negatives the facts stated in both pleas. *Fleming v. Toler*, 7 Grat. 310.

68. The Appellate Court will presume that a jury in a criminal case

\* See *New Con.*, Art. 6, § 11. Sess. acts 1852, p. 336. Sess. acts 1852, p. 53, ch. 61, § 1.  
† See *New Con.*, Art. 6, § 11. Sess. acts 1852, p. 336.

were discharged for sufficient cause, and that the defendant consented to or acquiesced therein, unless the record shows that he objected. *Dye's case*, 7 Grat. 662.

69. In a suit against several, the bill is dismissed as to one; but before the case is decided as to the others, the plaintiff files a bill to review the decree, and the defendant, as to whom the bill was dismissed, answers. The case on the bill of review is not set for hearing, nor is the decree, sought to be reviewed, set aside, but the original cause is brought on to be heard, without noticing the other cause at all, and the court decrees against the defendant as to whom the bill had been dismissed. *Helá*: This is no cause for reversing a decree, right upon the merits. *Berry v. Hoffman's committee*, 8 Grat. 49.

70. Upon an appeal by the home defendant, in a case of foreign attachment, from an interlocutory decree for the sale of land, the Appellate Court will not reverse the decree, because the court below did not decree against the absent debtor, or direct the security to be given as required by law, in behalf of absent defendants. This may be done in the final decree. *Kelley v. Linkenhoger*, 8 Grat. 104.

71. A party having obtained an injunction to a judgment at law, upon the usual condition of a release of errors, omits to execute the release. Pending the injunction suit, he obtains a *supersedeas* to the judgment at law, but does not perfect the appeal, by giving the security. There are repeated applications by him for a renewal of the supersedeas, which are granted, but he does not perfect the appeal; the injunction is proceeded in and decided against him, and he afterwards, more than ten years from the date of the judgment, asks that he may have a writ of error to the judgment at law, without giving security except for costs, which is granted. His *laches* in perfecting the appeal, being wilful and deliberate, and the application for the appeal, having been, under the circumstances, improper, the Court of Appeals will, upon motion of the appellee, dismiss the appeal. *Ross' Adm'r v. Reid and wife*, 8 Grat. 229.

72. Irregularities in a decree, which do not injure the appellant are not grounds for reversing it, upon his application. *Vance v. McLaughlin's Adm'r*, 8 Grat. 289.

73. Where an appeal or *supersedeas* is applied for since the Code of Va., 1849, went into operation, the application must be governed by the act therein, ch. 182, § 2, p. 687. *Clark v. Brown*, 8 Grat. 549.

74. In an action on the case for injury done to the plaintiff's land by the defendant's mill-dam, though the freehold and franchise were drawn into question, yet if the damages assessed by the jury are less than \$200, the Court of Appeals has no jurisdiction. *Ibid*.

75. The *scire facias* to revive the action of detinue against an adminis-

trator, with the will annexed, must suggest the coming of the property into the hands of the administrator, since the death of the testator. And the *scire facias* not being in the record, nor in the clerk's office of the court below, and no objection appearing to have been taken to it, in that court. The Court of Appeals will presume that it was in all respects regular. *Hunt's Adm'r v. Martin's Adm'r*, 8 Grat. 578.

76. The Appellate Court will not reverse a judgment for a mere clerical error, which might have been corrected in the court below, or by the judge in vacation, upon motion; but will amend and affirm the judgment, if there is no other error. *Tyree et als. v. Donnelly*, 9 Grat. 64.

77. A promissory note is signed R. H. E., [for S. H. E.,] the latter being in brackets. Parol evidence is admitted to prove that the note was intended to be the note of R. H. E. The evidence is proper, but if improperly admitted; yet as the court instructed the jury that the note was on its face the note of R. H. E., (which instruction was right,) the admission of the evidence could not be injurious to R. H. E., and it is therefore no ground for reversing the judgment. *Early v. Wilkerson and Hunt*, 9 Grat. 68.

78. There is an exception for the refusal of a County Court to continue a cause, on account of the absence of a material witness, but on appeal to the Circuit Court, by the party excepting, the case is again heard upon the record of the County Court, and upon the testimony of witnesses then examined before the court, one of whom is the witness referred to in the exception, and the judgment of the County Court is affirmed. The want of the witnesses' testimony before the County Court cannot be the subject complaint, in the Court of Appeals. *Mairs v. Gallahue*, 9 Grat. 94.

79. An exception is taken to the judgment of the County Court, authorizing the erection of a mill-dam, on the ground that it would be injurious to the health of the neighborhood; and the evidence is stated in the exception. The Circuit Court passes upon that question upon full evidence, and to its opinion there is no exception. As both the County and Circuit Court were satisfied upon that point, the Court of Appeals will presume that the proofs showed that the health of the neighborhood would not be affected by the erection of the dam. *Ibid.*

80. The judgment of the County and Circuit Courts giving leave to erect a mill-dam, provides that the applicant shall keep a ferry boat, at the crossing of a public road over the stream across which the dam is to be erected. It was *held*: That this being authorized by act 2 Rev. Code, ch. 235, § 5, and the County and Circuit Courts having held, upon the proofs, that a ferry boat at that place will sufficiently remedy any impediments to the crossing of the stream, the Court of Appeals will presume, that they acted rightly; nothing being shown to the contrary. *Ibid.*

81. A party claiming to be a corporation files a bill in Chancery. The

defendant denies that the corporation has been regularly organized, the plaintiff fails to prove it, but there is a sale of the defendant's land under a decree in the cause and a final decree, directing the purchase money to be paid to the plaintiff and the defendant appeals. The Court of Appeals will reverse so much of the decree as directs the purchase money to be paid to the plaintiff and remand the cause with directions to have the purchase money collected and paid to the defendant below, and then dismiss the bill at the cost of the plaintiff. *Bowyer's Adm'r et als. v. The Giles, Fayette and Kanawha Turnpike Co.*, 9 Grat. 109.

82. The County Court makes an order against the putative father of a bastard child that he shall pay to the overseers of the poor twenty dollars a year for seven years. They are entitled to recover this sum, though they have never paid anything for the support of the child. Upon an appeal, by the overseers in such a case, from the judgment of the County Court, the Circuit Court upon reversing the judgment, should not send the case back for a new trial, but should render a judgment in favor of the overseers for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Grat. 139.

83. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice, discretionary with the court and not a subject of appeal; and the subject of an exception properly ends, where the exception having been sustained, the defendant files another answer. *Craig v. Sebrell*, 9 Grat. 131.

84. There may be an appeal from a decree, directing an issue, where the decree impliedly involves a settlement of the principles of the cause. *Read v. Cline's heirs*, 9 Grat. 136.

85. The County Court, having directed the sheriff to pay certain claims out of county levies, which are collected, a demand upon the sheriff is necessary to sustain a motion against him and his sureties. But no objection for want of a demand having been made in the court below, and the notice averring the demand and the judgment giving a credit for part of the debt, as paid on the day, it was demandable, this is sufficient proof of a demand. *Cook, sheriff et als. v. Hays*, 9 Grat. 142.

86. A petition for an appeal having been presented to the court before the 1st day of July, 1850, though an appeal was not allowed, until after that date, no damages are to be allowed upon affirming that judgment. *Pryce v. Kyle*, 9 Grat. 247.

87. If plaintiff has an interest in the subject of a suit, though he has sued in a wrong character, the Appellate Court, whilst it will reverse a decree in his favor, will not dismiss the bill, but will send it back, that it may be amended as to the parties. *Sillings et als. v. Bumgarner, guardian*, 9 Grat. 273.

88. On motion by administratrix of high sheriff against a deputy and his sureties, for failure to pay over money made on an execution, the judgment and its recitals are sufficient evidence *prima facie* against them. And if the recovery by the creditor was barred by the statute of limitations, the deputy and his sureties must show it on the motion against them, otherwise it will be presumed against them in the Appellate Court. *Cox et als. v. Thomas' Adm'x*, 9 Grat. 323.

89. Unless it certainly appears upon the face of a judgment of the Circuit Court, that the court below had no jurisdiction, the Appellate Court will, in another cause, presume that the proceedings were such as to give it jurisdiction. *Ibid.*

90. A demurrer to a declaration is overruled in the court below and the Appellate Court reverses the judgment. The cause will be sent back with directions that the plaintiff shall have leave to amend the declaration. *Strange v. Floyd*, 9 Grat. 474.

91. A demurrer to a count in a declaration, for duplicity, is sustained and the plaintiff amends the count. He cannot object in the Appellate Court that the court below erred in sustaining the demurrer. *Hopkins, Bro. & Co. v. Richardson*, 9 Grat. 485.

92. The admission of an improper plea is error, and the Appellate Court will not inquire whether or not the plaintiff could have been injured by its admission. *Ibid.*

93. A commissioner's report made in a cause, shows that there is a small sum of money in the hands of an administrator, which the court below omitted to decree to certain creditors in exoneration *pro tanto* of a third party. The Appellate Court will not reverse the decree on this ground, but will correct the decree in this respect, and affirm it with costs to the appellees. *Williamson' Ex'r v. Goodwyn et als.*, 9 Grat. 503.

94. In a bill by a distributee against the administrator, for a settlement of his account and distribution, neither the bill nor the answer referring to the wife of the intestate, and there being no proof that she is alive, the Appellate Court will presume that she is dead. *Thomas v. Dawson and wife*, 9 Grat. 531.

95. Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of a trial, cannot be looked to, in considering another, yet where a bill of exceptions is taken after all the evidence has been submitted to the jury and the bill of exceptions purports to set out all the evidence, it seems that evidence set out on this bill of exceptions may be looked to in considering the question raised in another bill, taken in the progress of the trial. And this, though the evidence had not been introduced when the first bill of exceptions was taken. *Perkins Adm'r v. Hawkins Adm'x*, 9 Grat. 649.

96. Decree corrected upon an admission in the bill and affirmed. *Boyce's Adm'r, &c. v. Smith*, 9 Grat. 704.

97. A party who appeals from judgment on the ground of the admission of improper evidence, must state in his bill of exceptions all the facts, from which it will appear affirmatively to the appellate court, that the evidence was improper. *Johnson's Ex'or v. Jennings's Adm'r*, 10 Grat. 1.

98. In assumpsit for money lent and paid, the issues being, "*non assumpsit*" and the "statute of limitations," and the verdict being for the defendant on the last plea alone; the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment. *Ibid.*

99. A question is propounded to a witness, which is objected to, but the objection is over-ruled and an exception is taken. The exception does not state the answer of the witness, or that he answered the question. The appellate court will not reverse the judgment. *Ibid.*

100. In an exception to the opinion of the court excluding evidence, the exception must show the relevancy of the evidence, or it is no ground for reversing the judgment. *Ibid.*

101. If an exception is taken to an opinion of the court below, excluding written evidence, and the evidence is made a part of the exception, and is against the party excepting, the exclusion of the evidence is not error for which the appellate court will reverse the judgment. *Ibid.*

102. Upon an application to establish a public landing, if no motion has been made in the county court to quash the report of the viewers, it is too late to object to the report in the appellate court. *Muire v. Falconer et als.* 10 Grat. 12.

103. In such a case a party opposed to the establishment of the landing, having made himself a party in the cause, and taken an appeal, upon which all the proceedings subsequent to the report of the viewers were quashed; and it being proved that after the cause went back, he was served with notice, and he having appeared, and opposed the establishment of the landing, without objecting to the sufficiency of the notice, he cannot object to it in the appellate court. *Ibid.*

104. If an instruction is given on an abstract question, which may mislead the jury, it is an error for which the judgment will be reversed by the appellate court. *Pasley v. English*, 10 Grat. 236.

105. If a bill against two parties be taken for confessed, as to one of them and there be a joint decree against both; upon appeal by the one as to whom the bill was taken for confessed, the decree if erroneous, will be reversed as to both. *Purcell v. McCleary, et als.*, 10 Grat. 246.



106. A decree states that an order of publication against an absent defendant had been duly published. It is to be taken in an appellate court, that all the requirements of the statute have been complied with. *Moore et als. v. Holt*, 10 Grat. 284.

107. The affidavit of a witness that he was unable to attend the court, not having been objected to, in the court below, for want of notice, that objection cannot be made in the appellate court. *Taylor v. Smith*, 10 Grat. 557.

108. In a controversy between the commonwealth and a person convicted of a felony, in respect to the costs of the prosecution, the court of appeals has jurisdiction, without regard to the amount involved. *Anglea v. Commonwealth*, 10 Grat. 696.

109. A writ of error may be awarded in a criminal cause during the term of the court of appeals, returnable to the same term; and may be then heard. *Lazier's case*, 10 Grat. 708.

110. Though in all cases the opinion of the court before whom jurors are questioned and examined is entitled to great weight, yet upon exception taken, the appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary. *Montagu's case*, 10 Grat. 767.

111. The court below sets aside a competent juror. This is error for which the prisoner may except and have the judgment reversed. *Ibid.*

112. The appellate court will not enquire whether injury has been done to the prisoner by improperly setting aside a competent juror; but the law will intend prejudice to the prisoner. *Ibid.*

113. The facts exhibited in a bill of exceptions to the opinion of the court below granting an instruction must disclose an error in the instructions material to the issue and operating to the prejudice of the party excepting; or a party asking a reversal of a judgment on the score of an erroneous instruction on the trial must at least show that he had probably sustained injury thereby. Otherwise the instruction, though erroneous, is no ground for reversing the judgment. *Colvin v. Menefee*, 11 Grat. 87.

114. Improper evidence admitted on the trial of an issue joined upon an immaterial plea, is not ground for reversing the judgment of the court below, there being other material pleas in the case upon which judgment has been given for the appellees. *Richardson's Adm'r v. Prince George justices. Poindexter's Adm'r v. Same.* 11 Grat. 190.

115. When upon an issue joined in a chancery cause, there is a trial by a jury and a verdict, to which no exception is taken, and a decree is rendered thereon. Upon an appeal from the decree, the facts found in the

verdict must be regarded in the appellate court as the established facts of the case. *Lee's Ex'or v. Boak*, 11 Grat. 182.

116. The protest of a negotiable instrument being, in itself, sufficient to bind the endorser, the admission of parol evidence in support of it, is no ground for reversing the judgment of a court below. *Stainback v. The Bank of Virginia*, 11 Grat. 260.

117. The offence of a free negro in coming into the state is a misdemeanor for which he may be punished under the 28th § of chap. 198 Code of Virginia. But upon conviction of such misdemeanor, he is entitled under the 15th § of chap. 213 of Code of Virginia, to appeal from the justices' decision to the court of the county or corporation of such justice. If in such case the appeal is duly applied for and refused, the party may have relief by *mandamus* from the Circuit Court; and if the Circuit Court refuse to issue a *mandamus* in such a case, the party may apply to the Supreme Court of Appeals for a *supersedeas* or writ of error and have the action of the Circuit Court reviewed and corrected by that Court. *Morris ex parte*, 11 Grat. 292.

118. An Appellate Court will not undertake to decide whether the court below, decided right or wrong in refusing an instruction, unless the exception to the opinion of the court refusing the instruction sets forth the facts of the case so as to show the relevancy of the instruction. *Fitzhugh's Ex'or v. G. F. Fitzhugh*, 11 Grat. 300.

---

## APPEARANCE.

See PLEADING.

---

## APPLICATION OF PAYMENTS.

1. A creditor having a security for three bonds generally, and another security for one of the bonds, may apply the proceeds of the first security to the two bonds not secured by the last security. *Vance v. Monroe*, 4 Grat. 52.

2. A payment made by a debtor to his creditor cannot be applied by the creditor to the payment of a debt arising subsequently to the payment; unless the debtor assents thereto. *Law's Ex'or v. Sutherland et als.*, 5 Grat. 357.

3. A debtor executes four bonds to his creditor payable at successive periods and makes various payments upon them at different times. Upon a settlement after the death of the debtor, it is ascertained that the payments

made amount to more than the first bond. The creditor will not be allowed to apply the surplus to the payment of the fourth bond, there being a surety upon the second. The surplus must be applied to the payment of the second bond and the relief of the surety thereon. *Ross' Ex'or v. M'Laughlin's Adm'r et als.*, 7 Grat. 86. *Same v. Haden's Adm'r*, *ibid.*

4. A creditor by two judgments and a bond files a bill against the executor of his debtor and obtains a personal decree against the executor for the whole amount of his claims. An execution issues upon the decree and a portion of the money is made. The judgments being debts of highest dignity, the money so made is to be applied as a payment upon them, in relief of a party who is bound as a surety upon the judgments.\* *Ibid.*

5. In the above case, the executor sold the lands of his testator and paid the proceeds to the creditor. As the judgments were liens upon the lands, the payment is to be applied as a credit upon the judgments.\* *Ibid.*

6. A, an absent debtor, owns a tract of land on which there is a deed of trust to secure a debt. A sells two-thirds of the land to B, and takes for the purchase money eleven bonds payable at several periods, and a deed of trust upon the property sold to secure them. A assigns to C, the 5th, 6th and 7th bonds due, and B pays to A, either before the assignment or afterwards without notice, more than enough to pay the first four bonds. A living out of the state, D sues out a foreign attachment against him and attaches the one-third of the land not sold to B and the debt from B to A. The attachment being issued after the assignment to C. Held: 1st. That C as assignor of A is entitled as between him and A to the benefit of the deed of trust given by B to secure the payment of his bonds. 2nd. That C is entitled to have the one-third of the land not embraced in the second incumbrance applied in the first place to satisfy the first incumbrance, to the relief of the two-thirds of the land, conveyed by B to secure his bonds. 3rd. That the payments beyond the amounts of the first four bonds made by B to A without notice of the assignment, having been made on account, are not to be treated as applicable to the bonds assigned to C, but to the bonds held by A. 4th. That as between the attaching creditor and the assignee C, the latter had the preference. *Schofield v. Cox et als.*, 8 Grat. 533.

---

## APPOINTMENT.

See POWERS.

---

## APPRAISEMENT.

See PERSONAL REPRESENTATIVE.

\* See Code of Virginia, chap. 130, § 25, p. 544-5.

## APPRENTICES.\*

1. The order of a County Court orders a bastard child to be bound out by the Overseers of the Poor as an apprentice. It is a sufficient execution of the order, if only one of the Overseers of the Poor of the county executes the indentures. *Brewer v. Harris et als.*, 5 Grat. 285.

2. The master covenants with the Overseers of the Poor without naming them and the indenture is in the name of but one and he and the master only execute it. The indenture also contains covenants by the master in favor of the mother of the apprentice and also in favor of the apprentice; but they are not parties to it. The indenture is valid and the remedies will be adapted to suit the case. *Ibid.*

3. The statute 1 Rev. Code, ch. 108, sec. 25, p. 410, directs that female apprentices shall be bound out until they are eighteen years old. But a binding out until seventeen is valid. *Ibid.*

## ARBITRATION AND AWARD.†

1. D. and wife plaintiffs, and C. defendant in equity, agree to refer the matters in controversy in the cause to arbitrators; their award to be entered as the decree of the court. The award is made, whereby D. is directed to pay to C. \$994 22, with interest; and C. within ninety days after the award was entered as the decree of the court, was to convey to the wife of D. a good title to the property in controversy, and if he failed to do so, he should pay her \$1500. The award is entered as the decree of the court and C. fails to convey the property within ninety days. Held: 1. That this is a final decree which can only be reversed or altered by bill of review. 2. The conveyance must be made within the ninety days or C. is bound to take the property and pay the \$1500. *Davis & wife v. Crews*, 1 Grat. 407.

2. A cause is referred to arbitrators by rule of court. They meet, hear part of the evidence, and adjourn to enable the parties to take the testimony of a particular witness, but without appointing any particular time of meeting. Before they meet again, one of the parties writes to one of the arbitrators requesting them to meet about a time specified, stating that he wished to be present and that he had papers which would throw light upon the subject. The deposition of the witness, for whose evidence the delay had been made, having been taken, the arbitrators, at the request of one of the parties meet and make their award, in the absence of the party who had expressed a wish to be present, without any notice to him and before the

\* See Code of Virginia, chap. 125, p. 528. *Id.* chap. 126, p. 530. *Id.* chap. 198, § 29, p. 747.

† See Code of Virginia, chap. 153, p. 611. *Id.* chap. 176, § 20, p. 663. *Id.* chap. 149, § 5, p. 591.

time he had specified. Held: That this was misbehavior in the arbitrators; and the award should be set aside. *McCormick v. Blackford & Son*, 4 Grat. 133.

3. An award which is uncertain on its face and does not refer to anything by which it can be made certain, is void. In such case, or in any case where an award is void for uncertainty, the parties to the submission may assert their demands in any mode or form of action, which could have been maintained by them before they entered into the bond of submission. *Cau-thorn v. Courtney*, 6 Grat. 381.

4. An agreement to arbitrate (whether existing only in parol or evidenced by bond,) and under which the arbitrators have not proceeded to act, cannot be pleaded in bar of an action upon the original cause of action. *Ibid.*

5. An award being in pursuance of the submission, final in its character and read to the parties as, and for their award, it is final and complete though not actually delivered. *Pollard v. Lumpkin*, 6 Grat. 398.

6. There being no mistake on the part of the arbitrators as to the nature and contents of the award when it was signed and published by them as their award, though one of the arbitrators after the termination of his authority may think that the principles by which he was governed should have led him to a different conclusion. Such evidence is not of itself sufficient to set aside the award on the ground of mistake; such mistake not appearing on the face of the award, or from any paper or document connected therewith or referred to therein, all mistake being denied also by the other arbitrator. *Ibid.*

7. In an action on an award, if it does not clearly appear upon the face of the submission that the award does not cover the whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of "no award," to which the plaintiff may reply and shew that the award does cover the whole matter submitted. *Price v. Via's heirs*, 8 Grat. 79.

8. So if the parties have waived a decision on one branch of the matters submitted and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer thereto will not be sustained, but the plaintiffs should be allowed to reply the facts to the plea of "no award." *Ibid.*

9. A suit to set aside an award, the validity of which is directly put in issue, is referred to arbitration by an order in the cause. The award of the arbitrator affirming the validity of the first award is final and conclusive. *Morris v. Morris*, 9 Grat. 637.

10. Six causes are referred, by order of the court, to two arbitrators for arbitrament and award and in case of their disagreement to an umpire to decide between them, which award when made by them, or by the

umpire in case of their disagreement, and duly certified by them is to be entered as the judgment of the court. In case of disagreement between arbitrators, the decision of the umpire to be final, though he should disagree with both. The arbitrators and umpire sit together and a note of the evidence is taken by one for the convenience of all: upon a disagreement between the arbitrators, the umpire made his award, but without stating facts or giving reasons therefor, but sent to the clerk with his award, the note of evidence and papers before him. These papers and evidence are not a part of the award and cannot be considered on a motion to set the award aside. *Basset's Adm'r v. Cunningham's Adm'r*, 9 Grat. 684.

11. The arbitrators and umpire being all eminent counsel, it will be presumed they disregard improper evidence though it was admitted and the question reserved. *Ibid.*

12. An error of judgment on the part of the umpire with regard to the facts is not ground for setting aside an award. *Ibid.*

13. A mere mistake with regard to the date from which interest is to run, though apparent upon the face of the award, is no ground for setting it aside, the party in whose favor it is, consenting that it may be corrected in the judgment entered on the award. *Ibid.*

14. An executor has authority to submit a matter to arbitration, but he is liable as for a *devastavit*, if the estate is thereby injured. *Ibid.*

15. An executor making an improvident submission to an award, as to part of his testator's estate which is specifically bequeathed and the result of the submission being that the property is left in his hands as his individual property and he is compelled to pay for it; the legatee is not thereby precluded from recovering the specific property. *Nelson's Adm'r v. Cornwall*, 11 Grat. 724.

---

## ARDENT SPIRITS.\*

1. Two person may be jointly indicted or proceeded against by information for retailing ardent spirits to be drank where sold without a license, and upon their conviction, there should be a separate fine against each of \$30. *Harris & Hickman's case*, 7 Grat. 600.

2. In an indictment for retailing ardent spirits without a license, to be drank where sold, it is not error to use the word "or" in describing the names of the various kinds of liquors charged to have been sold. *Morgan's case*, 7 Grat. 592.

3. A license to one man to keep a tavern at his house in a village will

\* See Code of Virginia, chap. 38, § 14 to § 20, p. 208-9. *Id.* chap. 199, § 29, p. 752. *Id.* chap. 201, § 10, p. 756. Acts of 1850-51, p. 9, p. 33.

not authorize another, who formed a partnership with the first in the sale of the spirituous liquors, which the first was authorized to sell under his license, to sell liquors at a house on the same lot within the same enclosure with the tavern. *Hall's case*, 8 Grat. 588.

4. A medical witness for the commonwealth in a criminal case being accidentally present at a hotel where the jury are brought by the sheriff, invites the jury in the presence of the sheriff to drink with him; some of them accept the invitation. The act was inadvertent; but it is not sufficient to set aside the verdict. *Thompson's case*, 8 Grat. 638.

5. It is not misbehavior in a juror between the adjournment of the court in the evening and its meeting the next morning to drink spirituous liquors in moderation. *Ibid.*

6. An indictment for unlawfully selling ardent spirits to W. will not be sustained by proof of selling to C. *Taggart's case*, 8 Grat. 697.

7. Husband and wife may be jointly indicted for a single act of selling ardent spirits without a license. *Hamor and wife's case*, 8 Grat. 698.

8. A presentment for selling ardent spirits to be drunk at the place where sold, without a license, describes the defendant as a free negro. The description is immaterial and need not be proved. In such a case a writ of error lies for the commonwealth. *Scott's case*, 10 Grat. 749.

9. An indictment for selling ardent spirits by retail, to be drunk at the place where sold, without a license, must set out the place in the county, where the sale was made. It is not sufficient to state that the sale was made within the county. *Head's case*, 11 Grat. 819.

## ARREST OF JUDGMENT.\*

1. In the case of a misdemeanor, after the plea of not guilty and a trial and verdict on that plea, it is not competent to arrest the judgment for any supposed variance between the information and presentment. A defendant may avail himself of such variance, by shewing it as a cause against filing the information or by motion to quash it. *Jones' case*, 2 Grat. 555.

2. The court will arrest a judgment if a material constituent of the offence for which the prisoner is prosecuted, is omitted in the indictment. *Pea's case*, 2 Grat. 629.

3. The court will not arrest a judgment against defendants jointly prosecuted for selling ardent spirits to be drunk at the place where sold without a license; either because the information charges the offence jointly

\* See Code of Virginia, chap. 149, § 18, p. 594. *Id.* chap. 181, p. 630.

against the defendants for committing jointly one offence, or because the verdict of the jury being jointly against two defendants and the judgment of the court, if entered up imposes a fine upon the defendant severally for the commission of a joint offence. *Harris & Hickman's case*, 7 Grat. 600.

---

### ARSON.\*

1. In an indictment for arson under the 4th § of the act 1 Rev. Code, ch. 160, it is not sufficient to use the words "set fire to" but the word "burn" must be used. *Howel's case*, 5 Grat. 664.

2. An indictment for arson according to the common law form, is sufficient in the case of arson in the day time; but it would be more appropriate to charge the burning in the day time. For a burning at night however, it seems that the indictment must charge the burning in the night. *Curran's case*, 7 Grat. 619.

3. The indictment charges the burning the dwelling house of E. on the 11th of February, 1850. The verdict is, "guilty of arson in the day time on the 11th of February, 1850." The verdict is sufficiently certain. *Ibid.*

4. *Quære*: If the common law offence of arson is abolished. *Ibid.*

5. The malicious burning by the owner of a house on his own land, the house being then in the legal occupancy of another is a violation of the act of 1847-8, chap. 4, § 7, p. 99. *Erskine's case*, 8 Grat. 624.

6. The malicious burning of wheat threshed from the straw is not a violation of the § 6 of the same act. *Ibid.*

---

### ASSAULT AND BATTERY.†

1. A joint action of trespass, *vi et armis* for assault and battery, lies against husband and wife for an assault and battery committed conjointly by both. In such action there may be a verdict and judgment against the one, and in favor of the other. *Roadcap and wife v. Sipe*, 6 Grat. 213.

---

### ASSETS.

See PERSONAL REPRESENTATIVE.

\* See Code of Virginia, chap. 191, § 1, p. 723. *Id.* chap. 192, §§ 1-10, p. 727.

† See Code of Virginia, chap. 148, § 7, p. 589. *Id.* chap. 171, § 12, p. 647.



ASSIGNMENT.\*

1. The assignee for value of a note given for the purchase money of land, may maintain a suit for specific performance of the contract against his assignor the vendor (he having retained the title to the land to secure the purchase money) and the vendee, in a case proper for such relief, and subject the land to the satisfaction of his claim. *Hanna v. Wilson*, 3 Grat. 243.

2. The payee of an order drawn upon the debtor of the drawer, may consider the order as a transfer in equity of so much of the debt; and the debt being due for land for which the vendor has a lien, the payee may file a bill to enforce that lien. *Knisely v. Williams et als.*, 3 Grat. 265.

3. D. assigns a bond to H. with the following endorsement: "I assign the within bond to H. and agree not to take any legal advantage of said H. in the indulgence he may give." H. assigns the bond a few days after to M. who delays to sue the obligor until he becomes insolvent. D. is liable on this assignment not only to H. but to M. *McLaughlin v. Duffield*, 5 Grat. 133.

4. A bill of exchange is drawn by a legatee under a will upon the executors for value received, directing them to pay to the order of the drawee, a specific sum, the whole amount of the legacy, out of the funds in their hands, destined by the testator for the payment thereof. This is an equitable assignment of the legacy. *Anderson et als. v. De Soer*, 6 Grat. 263. *Same v. Gallego's Adm'r et als.*, *id.*

5. Y., the holder of a bond, agrees to assign it to D. to indemnify D. for becoming his security, but the bond not being present, is not then assigned. Afterwards Y. commits an act of bankruptcy, upon which he is declared a bankrupt. After the act of bankruptcy, Y. assigns the bond to D. who collects the money. D. is entitled to hold it as against the general assignee of the bankrupt. *Tucker v. Daly, assignee*, 7 Grat. 330.

6. A., an absent debtor, owns a tract of land on which there is a deed of trust to secure a debt. A. sells two-thirds of the land to B. and takes for the purchase money eleven bonds, payable at several periods, and a deed of trust upon the property sold to secure them. A. assigns to C. the 5th, 6th and 7th bonds due, and B. pays to A., either before the assignment or afterwards without notice, more than enough to pay the first four bonds. A. living out of the state, D. sues out a foreign attachment against him and attaches the one-third of the land not sold to B. and the debt from B. to A.; the attachment being issued after the assignment to C. Held: 1st. That C. as assignee of A. is entitled as between him and A. to the benefit of the deed of trust given by B. to secure the payment of his bonds. 2d. That C. is entitled to have the one-third of the land not embraced in the second incumbrance applied in the first place to satisfy the first incumbrance to the

\* See Code of Virginia, chap. 144, §§ 11, 14-16, p. 582-3.

relief of the two-thirds of the land conveyed by B. to secure his bonds. 3d. That the payments beyond the amount of the first four bonds made by B. to A., without notice of the assignment having been made on account, are not to be treated as applicable to the bonds assigned to C. but to the bonds held by A. 4th. That as between the attaching creditor and the assignee C. the latter had the preference. *Schofield v. Cox et als.*, 8 Grat. 533.

7. A bond is given for the purchase money of land and assigned by the obligee; the contract for the sale of the land is rescinded and the assignee recovers judgment. The debtor is not entitled to enjoin that judgment as against the assignee. *Drake v. Lyons*, 9 Grat. 54.

8. In such a case the debtor should not be permitted to enforce payment to himself by the assignor, until he had paid the judgment or released the assignor from his liability as such. *Ibid.*

9. An endorsement by a sheriff of his name on a prison bounds bond, before action brought upon it, is a sufficient assignment thereof. And the action may be maintained by the creditor as assignee, without writing out the assignment; or the assignment may be written out in the progress of the trial after the jury is sworn. *McGuire et als. v. Pierce, assignee, &c.*, 9 Grat. 167.

10. Bonds for the purchase money of a part of a tract of land, are assigned, and the vendor sells the other portion of the land to a third person. The assignee's being defeated in the recovery of the money from the vendee, whose bonds they hold, have no lien on the purchase money of the other part of the tract. *Ragsdale v. Hagy et als.*, 9 Grat. 409.

11. R., the obligee in a bond, endorses his name on the back thereof, for the purpose of enabling K. to buy goods on the faith of his endorsement; and H. sells goods to K. on the faith of the same, and before the time of the payment for the goods arrives, the obligor is insolvent. H. may maintain assumpsit against R. either as assignor or guarantor. *Hopkins, Bro. & Co. v. Richardson*, 9 Grat. 485.

12. If the holder of a bond endorse it in blank with intent to assign it and to enable his assignee to get credit upon the faith of the bond and of his assignment of it, the assignor may be regarded as authorizing his assignee to get money or goods on the faith thereof and to write over his name an assignment thereof for value received to the person making the advance. And this is not an undertaking for the debt of another, to which the statute of frauds and perjuries applies. *Ibid.*

13. Assignee delays for two years to sue the maker of a note. In the absence of proof of the maker's insolvency at the time or shortly after the note fell due, he cannot recover against the assignor. *Thompson v. Govan*, 9 Grat. 695.

14. An assignment of a bond in the absence of an express agreement to the contrary, imports a guaranty that the assignee shall receive the full amount of the bond from the obligor; and also the right of the assignee to resort to the assignor for any part thereof which he may have failed to collect from the obligor with the exercise of due diligence. *Peay v. Morrison's Ex'or*, 10 Grat. 149.

15. The bond in the above case is secured by a deed of trust upon land, which is not sold for some time after the bond falls due. The delay in the sale of the trust property not having been occasioned by the active agency of the assignee, he can not be regarded as assenting to it in any other sense than the assignor may; and it not appearing that the value of the security was diminished by the delay, that delay cannot discharge the assignor of his liability upon his assignment of the bond. *Ibid.*

16. The obligor in the bond having become insolvent before the bond fell due, though the deed of trust might have been enforced for the non-payment of the interest semi-annually; yet as it does not appear affirmatively, that a sale to pay the interest would have been judicious or expedient, the assignor is not released by the failure to sell. *Ibid.*

17. G., executor of R., dies and his administrator assigns the bond of T. to the executors of H. The executors recover judgment against T., who enjoins the judgment on the ground that G. owed him for a legacy left him by R., and injunction is perpetuated. The executors of H. are entitled to be substituted to the rights of T. against G.'s estate and are not confined to their remedy on the assignment of W. *Braxton's Adm'r, &c. v. Harrison's Ex'ors*, 11 Grat. 30.

18. The injunction in the above case ought not to have been perpetuated. But as G.'s administrator was a party to the suit and consented to the decree, and all the parties acted in good faith, the executors of H. are not thereby deprived of their remedy over against G.'s estate, in the hands of a subsequent representative of G. *Ibid.*

---

### ASSUMPSIT.\*

I. Two attachments against an absconding debtor are levied by different creditors on the same property. The first attachment levied is quashed by the County Court, an appeal is taken and pending the appeal, an order is made in the second case for a sale of the attached effects, and they are sold and the money paid over to the creditor in the second attachment. The judgment of the County Court in the first case is afterwards reversed. An action for money had and received will lie by the first attaching creditor against the creditor in the second attachment for the proceeds of the sale. *Caperton v. McCorkle & Adams*, 5 Grat. 177.

\* See Code of Virginia, chap. 171, § 13, p. 13. *Id.* chap. 176, § 43, p. 669.

2. *Indebitatus assumpsit* will lie by a common carrier to recover the amount of freight agreed upon, though part of the article to be carried was lost by the unavoidable effects of a storm. *Galt v. Archer*, 7 Grat. 307.

3. In an action of assumpsit by an administrator for a debt due to his intestate in his lifetime, defendant cannot set off a debt due him for money paid as surety of the intestate since his death. *Minor v. Minor's Adm'r*, 8 Grat. 1.

4. The count in an action of assumpsit by an administrator is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the administrator for money received, stating a sum certain; the count and bill of particulars are not sufficient to admit proof of an admission by the defendant that he had received from a third person a certain sum belonging to the estate of the plaintiff's intestate. *Ibid.*

5. A general *indebitatus assumpsit* count may be joined with a count in assumpsit upon a special contract of bailment, setting out the promise and undertaking of the defendants, the consideration on which it was founded, the breach of that promise by the defendants and their neglect and carelessness and the loss to the plaintiff occasioned thereby. *Kennaird, &c. v. Jones*, 9 Grat. 183.

6. Upon a contract for the sale of a raft of logs, the balance of the price was to be paid when an act was done by the vendees. In an action by the vendors to recover the price they must prove the performance of this act or that the vendees had unduly neglected, failed and refused to perform it. *Ibid.*

7. The payment of money to a surveyor of a county, for which he is to furnish a warrant and enter and survey a specific piece of land is not a sufficient consideration for a promise by his successor to do these things, to support an action of *assumpsit* against the successor. *Hall v. Crew and wife*, 9 Grat. 263.

8. The mere statement in writing of the assignor without consideration of a bond, that he is aware of no offset or objection to said bond, nor of any thing to affect his liability as assignor thereof is not sufficient to support an action of *assumpsit* by the holder against the assignor, and a count in a declaration setting forth that fact as the consideration of the *assumpsit* is had on demurrer. *Hopkins, Bro. & Co. v. Richardson*, 9 Grat. 435.

9. R., the obligee in a bond, endorses his name on the back thereof, for the purpose of enabling K. to buy goods on the faith of his endorsement and H. sells goods to K. on the faith of the same; and before the time for payment of the goods arrives, the obligor becomes insolvent. H. may maintain *assumpsit* against R., either as assignor or guarantor; and his undertaking is not one to which the statute of frauds and perjuries applies. *Ibid.*

10. Though services rendered with a view to a legacy and not in the expectation of a reward, in the nature of an ordinary debt, will not be generally the ground of an action; yet if performed upon request of the party served, or if he has promised to pay for the services either before or after they were performed, an action is maintainable. *Jones v. Jincey et als.*, 9 Grat. 708.

11. To entitle a party to recover back money which he has paid upon a contract, which has been wholly rescinded or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction. *Johnson's Ex'x v. Jennings' Adm'r*, 10 Grat. 1.

12. In such a case, it is better to declare on the common count for money had and received. But if the plaintiff declares specially, it must appear with sufficient certainty from the facts so set out or from apt averments made in the count, that the consideration has wholly failed and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. *Ibid.*

13. In an action of *assumpsit* against an administrator, he pleads the statute of limitations. It is no sufficient answer to this plea to reply that the defendant's intestate sold to the plaintiff slaves in payment of the debt declared on, but that the defendant since the death of the intestate, had, as administrator, sued for and upon the title alone, recovered the said slaves within five years before the action brought, without regard to any indebtedness on the part of his intestate to the plaintiff. *Ibid.*

14. In an action of *assumpsit* for various sums of money lent to or paid for the defendants' intestate, though payments or set-offs cannot be proved without such an account of payments or set-offs filed, yet defendant may prove that the money sued for or any part thereof was not lent to or paid for the intestate, but was paid out of money of the intestate in the hands of the plaintiff. *Ibid.*

15. A bond is given for a loan of money, which is to be paid in a few days by a debtor of the obligor. The debtor pays the debt and takes up the bond. It is thereby extinguished; and if in a future settlement, between the borrower and his debtor who paid the bond, this claim is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower. *Young for dec. v. Johnston*, 10 Grat. 269.

---

## ATTACHMENTS.

1. An absent debtor's distributable interest in an estate in the hands of an administrator may be subjected by foreign attachment, to the payment of the debt. *Moores v. White et als.* 3 Grat. 139.

2. A decree *in personam* against an absent debtor is as conclusive as other decrees, in all collateral controversies. So that if property is sold under execution issued thereon, the title to said property cannot be impeached by objections to the form or merits of the decree. *Rootes Ex'x v. Tompkins' Trustees*. 3 Grat. 98.

3. Such a decree is *prima facie* evidence of the claim it establishes and repels the statute of limitations except so far as the statute applies to decrees. *Ibid.*

4. A decree *in personam* against an absent debtor is not conclusive after seven years. *Ibid.*

5. It is not necessary that an attachment against an absconding debtor shall state the nature of the debt, whether due by bond, note, account, or otherwise. *M'Clung & Co. v. Jackson*, 6 Grat. 96.

6. An attachment against an absconding debtor being sued out by one member of a firm for a debt due the firm and in the name of the firm, it is proper that the bond executed by the partner, who sues out the attachment, and his surety, should bind the obligors to be answerable for the failure of the firm to prosecute their attachment with success. *Ibid.*

7. A subsequent attaching creditor may appear to the first attachment and either in his own name or in the name of the absconding debtor, contest the right of the first attaching creditor to recover. *Ibid.*

8. A note is given for the amount of an account; it is discounted at bank for the creditor: before it falls due the debtor absconds. The creditor cannot maintain an attachment against the debtor for the debt due on the account. *Ibid.*

9. Among attaching creditors, proceeding by foreign attachment, the creditor whose *subpoena* is first sued out and served, is entitled to priority of satisfaction. *Farmer's Bank v. Day et als.*; 6 Grat. 360.

10. A foreign attachment only operates as a lien upon the debts and effects of a debtor in the hands of the home defendant against whom it is issued and upon whom it is served. *Ibid.*

11. In a foreign attachment, the home defendant holds lands of the absent debtor, upon a lease. The service of the attachment only binds the rents due at the time the attachment was served, and does not bind the rents accruing subsequently. *Haffey, &c. v. Miller, &c.*, 6 Grat. 454.

12. In a proceeding by foreign attachment, the home defendant having the property of the absent defendant in his possession, for the keeping of which the absent defendant is indebted to him, is entitled to have his claim first satisfied out of the property as against the attaching creditor. *Williamson v. Gayle et als.*, 7 Grat. 152.

13. An attaching creditor, having established his debt is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant. *Ibid.*

14. A creditor of a deceased debtor may proceed, by foreign attachment, against the heirs, residing out of the state, to subject land or its proceeds in the state descended to them from the debtor. *Carrington et als. v. Didier, Norvell & Co.*, 8 Grat. 260.

15. If the land has been sold under a decree at the suit of the heirs and is in the hands of a commissioner, he should be made a party as such and should be restrained, by endorsement on the process. from disposing of the proceeds. *Ibid.*

16. A wife's interest, as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of the husband, by a proceeding by foreign attachment, when the husband resides out of the state. *Vance v. McLaughlin's Adm'r*, 8 Grat. 289.

17. Though service of the process upon the executor creates a lien upon the wife's interest in favor of the creditor, yet if the husband dies, pending the proceedings, leaving the wife surviving him, the lien of the creditor is defeated and the property belongs to the wife. *Ibid.*

18. A, an absent debtor, owns a tract of land on which there is a deed of trust to secure a debt. A sells two-thirds of the land to B and takes for the purchase money eleven bonds, payable at several periods, and a deed of trust upon the property sold to secure them. A assigns to C the 5th, 6th and 7th bonds due; and B pays to A either before the assignment or afterwards without notice, more than enough to pay the first four bonds. D sues out a foreign attachment against A and attaches one-third of the land not sold to B and the debt due by B to A, the attachment being issued after the assignment to C. *Held*, 1st. As between the attaching creditor and the assignee, C, the latter has the preference. 2nd. That the attaching creditor proving his debt, is entitled to a personal decree against his absent debtor, though the property attached may be adjudged to the assignee. *Schofield v. Cox et als.*, 8 Grat. 533.

19. Though a home defendant claims the land in his possession as a purchaser, and shews a receipt for the purchase money, yet as he does not pretend that he paid in money and as his account against the absent debtor is not proved to the satisfaction of the court, the land will be held liable. *Kelly v. Linkenhoger*, 8 Grat. 104.

20. In such case, upon an appeal from an interlocutory decree for the sale of the land, the appellate court will not reverse the decree because the court below did not decree against the absent debtor or direct the giving security as provided by law in behalf of the absent defendants. That may be done in the final decree. *Ibid.*

21. In a foreign attachment, the absent defendant who does not appear in the court below, cannot appeal. *Lenow v. Lenow*, 8 Grat. 349.

22. But there being two absent defendants, who are sued for a joint debt, one of whom appears and answers, and there being a joint decree against both, upon the appeal of the one who did appear, the decree will be reversed as to both. *Ibid.*

23. Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale. *Moore et als. v. Holt*, 10 Grat. 284.

24. It is not necessary that the plaintiff in a foreign attachment shall file with the clerk an *affidavit* of the non-residence of his debtor before the process is issued, in order to constitute the process with the endorsement upon it in the nature of an attachment a lien when served. *Ibid.*

25. The endorsement in the nature of an attachment does not authorize the officer serving the process to take the effects out of the hands of the garnishee or to require him to give security to have them forthcoming; nor does it operate as an injunction, so as to subject the party to the penalty of a contempt for disobedience. If the plaintiff desires such an order of the court as will effect these purposes, he must file the *affidavit* according to the statute. *Ibid.*

26. It is not necessary to state in the endorsement on the *subpoena* the character or amount of the claims for which the attachment is issued. This is to be done in the bill. *Ibid.*

27. What circumstances are sufficient to show that the debtor had gone beyond the state, without an intention to return, when the process, issued in a foreign attachment, was served. *Ibid.*

28. The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in the appellate court that every thing required by the statute was done. *Ibid.*

29. A guarantor of a debt may maintain a foreign attachment against the principal before he has paid the debt. *Ibid.*

30. A creditor at large may maintain a suit in equity, in the nature of a foreign attachment to set aside a fraudulent deed conveying real estate, made by his debtor; both the debtor and his grantee living and being out of the commonwealth. *Peay v. Morrison's Ex'ors*, 10 Grat. 149.

31. A party contracts a debt in the state, and soon thereafter removes



out of the state; and after seven years dies. To a proceeding by foreign attachment to recover the debt, the statute of limitations is a bar. *Markle's Adm'r et als. v. Burch's Adm'r*, 11 Grat. 26.

32. The act of April 3d, 1852, (*Sess. acts* of 1852,) gives a remedy in a court of equity against an absent debtor, where the debtor has estate or debts due him in the county or corporation in which the suit is brought. *O'Brien et als. v. Stephens et als.*, 11 Grat. 610.

33. The affidavit required by the statute of April 3d, 1852, to authorize a creditor to sue out an attachment against the effects of an absent debtor, may be made either before or after the bill is filed. *Ibid.*

34. When the court has properly taken jurisdiction of a cause against an absent debtor, it must proceed to give relief according to the principles of equity. *Ibid.*

35. If an absent debtor does not appear in the cause, there cannot be a personal decree against him. But if he does appear, there may be a personal decree only against him; or there may be both a personal decree and a decree subjecting the attached effects. *Ibid.*

36. If the absent debtor appears and the attachment has not been sued out or levied, there may still be a personal decree against him. Or, the plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment and have it levied on the effects of the debtor and have them subjected. *Ibid.*

37. A demurrer to a bill against an absent debtor will not lie for the failure to aver that an attachment had issued; because the statute, in terms, provides, that this process may issue after the institution of the suit. *Ibid.*

38. The statute 1 Rev. Code, p. 475-6, sec. 4, which provides that a decree against an absent defendant shall, after seven years, stand absolutely confirmed against him, does not protect a decree procured by fraud after the death of the absent defendant, without suggesting his death or reviving the suit against his representative or heirs. *Evans et als. v. Spurgin et als.*, 11 Grat. 615.

## ATTEMPTS TO COMMIT CRIME.\*

1. To constitute an offence under the act of 1848, chap. 11, sec. 12, the attempt to commit the crime must be made by an actual ineffectual deed, done in pursuance of and in furtherance of the design to commit the offence. *Uhl et als. case*, 6 Grat. 706.

\* See Code of Virginia, chap. 199, sec. 10, p. 750. *Id.* chap. 208, sec. 32, p. 777-8.

2. If parties combine to commit an offence, and they all assent to it, and some of them only, go to do the act, all are principals in the offence. *Ibid.*

3. The overt act done in the attempt to commit the offence need not be the last proximate act prior to the consummation of the felony attempted to be perpetrated. *Ibid.*

4. An indictment for an attempt to commit an offence, ought to charge some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment. *Clark's case*, 6 Grat. 675.

---

### ATTORNEY IN FACT.\*

1. An attorney in fact may execute a deed binding his principal either by signing the name of his principal with a seal annexed, stating it to be done by him as attorney for the principal, or by signing his own name with the seal annexed, stating it to be for his principal. *Shanks et als. v. Lancaster*, 5 Grat. 110.

2. A deed is executed by an attorney in fact, in which he refers to the power of attorney, but conveys in his own name as attorney and covenants and warrants in his own name on behalf of his principal; the deed being signed with the name of the principal as by the attorney. It is the deed of the principal. *Ibid.*

3. A deed executed under a power of attorney, commences in the name of the grantor by the attorney, and is signed in the name of the attorney for the grantor. It is a valid deed. *Bryan v. Stump, &c.*, 8 Grat. 241.

---

### ATTORNEY AT LAW.†

1. An attorney receives a claim for collection, brings suit and obtains judgment upon it. The debtor then puts into his hands the bond of a third person for about the amount that is due on the judgment; and the attorney gives him a receipt by which he has received the bond on which he is to bring suit, and after paying himself his fee and commission, is to apply the balance to the credit of the judgment. The attorney receives the money on the bond, but does not pay it over to the creditor. Held: this is a valid

\* See Code of Virginia, chap. 116, § 3, p. 500. *Id.* chap. 121, p. § 1, 511. *Id.* chap. 176, § 16, p. 663.

† See Code of Virginia, chap. 164, p. 635, 636. *Id.* chap. 132, § 6, p. 548. *Id.* chap. 181, § 3, p. 680. *Id.* chap. 177, § 9, p. 672. *Id.* chap. 208, § 2, p. 773.

payment by the judgment debtor. *Smith's Adm'r v. Lamberts*, 7 Grat. 138.\*

---

### AUTREFOIS CONVICT.†

1. A conviction for advising one slave to abscond is no bar to a prosecution for advising another slave to abscond; though the advising was to both at the same time by the same words and acts. *B. Smith's case*, 7 Grat. 593.

---

### AUTHENTICATION.‡

1. A certificate of the secretary of the state of Ohio, under the great seal of the state, that a statute certified, is correctly copied from the original rolls on file in his office is a due authentication of the statute under the act of Congress. *Wilson v. Lazier et als.*, 11 Grat. 477.

2. A deposition purporting in the caption to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J. P. is duly authenticated. *Hobbs v. Shumate*, 11 Grat. 516.

---

### AWARD.

See ARBITRATION AND AWARD.

---

### BAIL.§

1. Upon a *scire facias* against bail, it is error to give judgment for the aggregate amount of principal, interest and costs of the first judgment with interest thereon. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

\* The duties and powers of an attorney at law are elaborately discussed in the opinion in this case.

† See Code of Virginia, chap. 199, §§ 13, 14, p. 751; see also § 25 *et seq.*, pp. 752, 3.

‡ See Code of Virginia, chap. 176, § 14—16, pp. 662, 3. *Id.* § 26—29, pp. 665, 6.

§ Aa to excessive bail, see Con. U. S. art. 8, Bill of Rights, § 9. Aa to bailing fugitives from other states, see Code of Virginia, chap. 17, § 12, p. 104. In civil cases, see Code of Virginia, chap. 146, § 6, p. 587. *Id.* chap. 183, § 5, p. 689; chap. 188, § 1, p. 716; Amended Acts, 50-1, p. 36, and Acts, 52, p. 77; Code of Virginia, chap. 156, § 6, p. 614; chap. 207, § 21, p. 771-2. In criminal cases, see Code of Virginia, chap. 204, § 6, p. 761, 2. *Id.* chap. 207, § 21, p. 771, 2. *Id.* chap. 204, § 7, p. 762. *Id.* chap. 211, § 3—13, pp. 784, 5, 6.

2. Upon a trial of a *scire facias* against bail the function of the jury is exhausted, when it negatives the defendants plea of *nul tiel record*, and it is then the province and duty of the court to enter up judgment according to the *scire facias*. *Ibid*.

3. If in such case, the jury proceed to find a verdict for the plaintiff and find a sum differing from that stated in the *scire facias*, it is merely supererogatory; and the court should give judgment for the proper sum. *Ibid*.

4. A justice of the peace has no general authority to admit to bail after an examining court has sent the prisoner to the Superior Court for trial. If the examining court refuses to bail, or is silent, the justice has no right to admit to bail; though a judge of the general court may. *Hamlett et als: v. Commonwealth*, 3 Grat. 82.

5. After a trial before an examining court, a justice, in taking a recognizance of bail, can only rightfully act as the agent of the examining court, in execution of its judgment, and after it has judicially decided that the prisoner is bailable, and fixed the amount of bail. *Ibid*.

6. The recognizance of bail, taken by a justice, of a prisoner sent on for trial by the examining court, must shew on its face that the examining court has entered of record that the prisoner was bailable, and had fixed the amount in which bail should be taken. *Ibid—et Saunder's Adm'r v. Commonwealth*, *id.* 214.

7. A prisoner indicted for felony may be let out on bail, when his continued confinement would endanger his life. *Archer's case*, 6 Grat. 705.

8. Upon a *scire facias* against special bail, he surrenders his principal and gives notice thereof to the attorney of the plaintiff, the plaintiff not living in the county. But there is an office judgment against the bail and he not defending it, equity will not relieve him. *Allen, Walton & Co. v. Hamilton*, 9 Grat. 255.

9. In a case of *scire facias* against bail upon a recognizance in a case of felony, a plea which alleges that at the time the recognizance was entered into, the principal was by law acquitted and discharged of the said several supposed felonies of which he stood charged, presents no defence for the bail: and this whether the bail is to be considered as averring an acquittal of the prisoner upon a trial had or his discharge by operation of law for the failure to try him within three terms of the court. *Archer v. Commonwealth*, 10 Grat. 627.

10. In such a case, a plea that at the time of entering into the recognizance the prisoner was unlawfully imprisoned by the Commonwealth, and detained in prison until by duress of imprisonment, he and his sureties entered into the recognizance, presents no defence for the bail. *Ibid*.

11. The condition of the recognizance being that the principal shall make his personal appearance on the first day of the next term of the court and

not depart thence without leave of the court, a plea that the principal did appear on the first day of the term of the court to which he was recognized, but that the judge who presided on the said first day of the term, would not sit in his case or make any order therein, does not present a defence for the bail. *Ibid.*

12. A plea that a previous prosecution against the principal for the same offences, to which, by the recognizance, he had undertaken to appear, had been terminated by a *nolle prosequi* presents no defence to the action against the bail. *Ibid.*

13. In declaring on a recognizance, it is not necessary to aver the existence of the particular facts which show that the court or officer taking the recognizance had authority to take it. *Ibid.*

---

## BANKS.

1. There is no warranty of value on the sale or exchange or payment away of a genuine bank note. *Edmund v. Digges*, 1 Grat. 359.

2. It seems that there is a warranty of the genuineness of a note sold, changed or paid away. *Ibid.*

3. If a person appointed a director of a bank by the executive, under the act of March 22nd, 1837, Acts, p. 57, declines to accept the office, or resigns, the executive is not authorized to make another appointment, but his place is to be supplied by the Board of Directors. *Bank of Virginia v. Robinson*, 5 Grat. 174.

---

## BANK NOTES.

See BANKS.

---

## BANKRUPT.

1. A bankrupt having obtained his discharge, after a judgment had been obtained against him, may enjoin the suing out or levy of an execution upon the said judgment. *Peatross v. McLaughlin*, 6 Grat. 64.

2. A debtor agrees to assign a bond of which he is the holder, to indemnify one who becomes his surety, but the bond is not present and is not then assigned. Afterwards the debtor commits an act of bankruptcy, upon which he is duly declared a bankrupt. After the act of bankruptcy, the debtor assigns the bond to the person who became his surety, who collects

the money. The surety is entitled to hold it against the general assignee of the bankrupt debtor. *Tucker v. Daly, assignee*, 7 Grat. 330.

3. The sureties of a public officer are entitled to the benefit of the bankrupt act of 1841, and may plead their bankruptcy in any proceeding on the part of the Commonwealth against them as sureties. *Saunders v. Commonwealth*, 10 Grat. 494.

4. Debts due to the States by their officers are not subjected to the provisions of the bankrupt act of 1841, and the discharge of a bankrupt officer of the United States under the bankrupt law does not release the liability of the officer to the State, though it releases that of the surety. *Ibid.*

5. The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt: and it may be enforced by the state courts against the general assignee of the bankrupt's effects. *McCance v. Taylor*, 10 Grat. 580.

6. In such a case the *elegit* sued out upon the judgment may be in the usual form; and in executing it, the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy the *elegit* upon that which is so subject. *Ibid.*

---

## BASTARDS.

1. A bastard marries and dies leaving a legitimate child, and afterwards the parents of the bastard intermarry, the father of the bastard before his (the father's) marriage and in the lifetime of the bastard, recognizes her as his child, and so recognizes her after his marriage, which is after her death. The child of the bastard may inherit through his mother from her father. *Ash v. Way's Adm'r*, 2 Grat. 203.

2. The order of a county court directs a bastard child to be bound out by the Overseers of the Poor as an apprentice. It is a sufficient execution of the order, if only one of the Overseers of the Poor of the county executes the indentures. *Brewer v. Harris et als.*, 5 Grat. 285.

3. The father of a bastard child, whose mother was a married woman deserted by her husband, required to pay to the Overseers of the Poor a certain sum annually for six years, commencing from the birth of the child, if it should so long live. *Lyle v. Overseers of the Poor of Ohio County*, 8 Grat. 20.

4. The county court makes an order against the putative father of a bastard child that he shall pay to the Overseers of the Poor twenty dollars a year for seven years. They are entitled to recover this sum, though they have never paid any thing for the support of the child. Upon an appeal by the Overseers in such a case, from the judgment of the County Court, the Circuit Court should not send the case back for a new trial, but should

render a judgment in favor of the Overseers for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Grat. 139.

---

## BILL OF EXCHANGE.

See NEGOTIABLE PAPER.

---

## BILL IN EQUITY.

1. *Quære*: If bill dismissed upon demurrer is a bar to another suit for the same subject matter. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. Bill having been taken for confessed as to one of several sureties in a guardian's bond, which is void, should be dismissed as to him, as well as to the others who had made the defence. *Austin v. Richardson*, 1 Grat. 310.

---

## BILL OF PARTICULARS.

See PLEADING.

---

## BILL OF REVIEW.

1. The failure of a justice of the peace to forward a deposition taken by him, to the clerk of the court in which the cause is pending; and the cause having been heard and decided without it, is no ground for a bill of review. *Niday v. Harvey & Co. et als.*, 9 Grat. 584.

---

## BONDS.\*

1. The action against a high sheriff and his sureties, upon his official bond, for misconduct of his deputy in his proceedings on an execution in his hands, must be at the relation of the plaintiff in the execution; and cannot

\* As to bonds taken by courts and officers, see Code, p. 88, chap. 13, §§ 8, 9, 10, Acts 50-1, p. 36. When and where bond taken under order, &c., to be returned, see Code p. 251, chap. 49, § 28. When bond to have force of judgment, Code, p. 224, chap. 42, § 16. *Id.* p. 720, chap. 189, § 2. How surety on official bond or his representative may require new bond of officer, Code, p. 586, 7, chap. 146, § 1, *et seq.* Attachment bond, see Code, p. 608, chap. 151, § 32. Clerk's duty as to preparing bonds, see Code, p. 632,

be sustained at the relation of the parties for whose benefit the execution is issued. *Governor for Leightons v. Hinchman et als.*, 1 Grat. 157.

2. An indemnifying bond given to the sheriff on the sale of property sold under execution, which contains the conditions prescribed by the act of \$1819, 1 Rev. Code, ch. 134, § 25, p. 533, though it does not contain the provisions prescribed by the act of 1828. Sup. Rev. Code, p. 272, is a good statutory bond to protect the sheriff from the action of the claimant of the property. *Aylett v. Roane*, 1 Grat. 282.

3. A guardian's bond blank as to the penalty is, as to the sureties in such bond, a mere nullity. *Austin v. Richardson*, 1 Grat. 310.

4. An action may be maintained on the official bond of a sheriff, in the name of a person who was governor at the time the bond was executed; and it is not necessary to sue in the name of his successor in office. *Governor for Brian v. McCulloch*, 2 Grat. 175.

5. The giving of a forthcoming bond, (which is forfeited,) by one of the debtors in a joint judgment, does not discharge and extinguish the original debt as against the other joint debtors. *Robinson et als. v. Sherman et als.*, 2 Grat. 178. *Leake v. Ferguson, id.*, 419.

6. The surety in the forthcoming bond is a surety for the debt. *Ibid.*

7. A mercantile firm being plaintiffs in an execution, the forthcoming bond executed by one of the firm in the name of the partnership, is a good bond of the party so executing it, and the recital of the names of the plaintiffs in the execution, by their partnership name is sufficient. *Davis v. Davis*, 2 Grat. 363.

8. One indemnifying bond may be taken on several executions, and it is not necessary to set out the executions in bond. *Ibid.*

9. An obligor in a bond is not discharged by payment to a party claiming under a forged assignment of which the obligor had knowledge, though the payment was made under execution. *Jameson's Adm'r v. Deshields*, 3 Grat. 4.

chap. 163, § 17. Motion on bonds, taken by, or of officers, see Code, p. 639, chap. 167, § 4. As to official bonds executed before the Code, see Code, p. 640, 1. chap. 168, § 3. Judgment on bond, see Code, p. 673, chap. 177, §§ 16, 17. Who may execute bond for order, &c., see Code, p. 689, chap. 184, § 3. Jurisdiction of court on penal bond, *Id.* § 2. As to lien of judgment or bond having the force of a judgment, see Code, p. 709, chap. 186, §§ 3, 6, 7, 8. Limitation of action on, Code, p. 591, chap. 149, §§ 5, 6, 7, 15, 16, 17, 19. Injunction bond, see Code, p. 678, chap. 179, §§ 8, 10, 11. *Id.* p. 685, chap. 182, § 13. Indemnifying bond, see Code, p. 609, 10, chap. 152, §§ 2, 4, 5, 6. Acts 52, p. 78. Code, p. 715, chap. 188, § 22. Forthcoming bond, see Code, p. 678, 9, § 10 *et seq.* *Id.* p. 720-1, chap. 189, § 1 *et seq.* Suspending bond, see Code, p. 609-10, chap. 152, §§ 2, 6. Acts 1852, p. 78. Refunding bond, see Code, p. 553-4, chap. 132, §§ 30, 31. Appeal bond, see Code, p. 685-6, chap. 182, §§ 13, 14, 15.



10. A bond executed without consideration for the purpose of being sold by the obligee for the benefit of the obligor is of no obligatory force until it passes into the hands of a holder for value. *Harnsberger's Ex'or v. Geiger's Adm'r*, 3 Grat. 144.

11. An endorsement on such bond, made before it passes to a holder for value, is part of the bond in the hands of such holder; and is on the same valuable consideration as the rest of the bond. *Ibid*.

12. A conditional agreement by the holder of a bond to give time to the principal obligor, will not bind the holder unless the condition of the agreement be strictly complied with, and therefore, though such agreement was without the consent of the surety, yet if the condition has not been complied with the surety is not released. *Ibid*.

13. An administration bond not conforming to the requirements of the statutes and containing no provision for the benefit of creditors, the sureties therein are not liable to creditors. *Roberts v. Colvin*, 3 Grat. 358.

14. A bond is given with condition to convey land with general warranty, and to indemnify against the title or claim of any other person. The land is conveyed accordingly and no title is established against the obligee, though it is against another person, as to another part of the same tract of land. There is no breach of the condition and the obligee has no right to sue on the bond. *Henkle's Ex'or v. Allstadt et als.*, 4 Grat. 284.

15. An action of debt is brought on an injunction bond, the defendants crave *oyer* of the bond and demur to the declaration. It appears that the bond is defective, in not obliging the obligors to pay such costs as may become due. The defect in the bond is not injurious to the obligors in the bond, and they cannot complain of it or sustain their demurrer. *Gillespie et als. v. Thompson et als.*, 5 Grat. 132.

16. A bond is given for the hire of a negro man, and expresses on the face of the bond that he is "to work at the boat business." Suit is instituted on the bond and the defendants offer a special plea under the act of 1831, that the negro man was not suitable for and did not perform the work as stipulated in the bond, but was wholly unfit for the purposes for which he was hired, also charging upon the plaintiffs the *scienter*. Held: 1st. The words "to work at boat business," attach no condition to the payment of the money. 2nd. The bond is not the contract of hiring, but a contract for the payment of the hire agreed upon. *Howell v. Cowles*, 6 Grat. 393.

17. In an action on an indemnifying bond, the relator claims title to the property sold, under a sale by deed of partnership property by one partner, without the knowledge or consent of the other. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration of his ownership of the property. *Forkner v. Stuart et als.*, 6 Grat. 197.

18. A debtor makes four bonds payable at successive periods and makes at different times payments, which upon a settlement after the death of the debtor, are ascertained to amount to more than the first bond. There is a surety on the second bond; the creditor will not be allowed to apply the surplus to the fourth bond, but the court will apply it to the second bond in relief of a party bound as surety in that bond. *Ross' Ex'or v. McLaughlin's Adm'r*, 7 Grat. 86. *Same v. Haden's Adm'r*, *id.*

19. A creditor by two judgments and a bond files a bill against the executor of the debtor and obtains a personal decree against the executor for the whole amount. Upon an execution which issued on this decree a part of the money is made. The judgments being debts of the highest dignity, the money so made is to be applied as a payment upon them, in relief of a party who is bound as surety for the judgments. *Ibid.*

20. A voluntary bond is executed for a specific purpose and upon an expressed precedent condition. If the purpose has been effected otherwise, the bond cannot be enforced by the obligee. *Columbian College v. Clopton's Adm'r et als.*, 7 Grat. 165.

21. The penalty and condition of a bond for the payment of money are in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment. *Fleming v. Toler*, 7 Grat. 310.

22. A bond with condition to convey land of which the obligor had neither title nor possession, passes nothing. *Coles v. Miller et als.*, 8 Grat. 6.

23. A committee of a lunatic is required on the record to give a bond for counter security and the record says he gave it, but the bond taken was a new bond. The bond acknowledged and certified became a part of the record and is to be construed with the record as showing what was required by the court and therefore it must be taken that the court required a new bond. *Berry v. Homan's committee*, 8 Grat. 48.

24. A bond is executed with the names of some of the obligors in the penalty, but it is signed by one whose name is not there: it is his bond. *Ibid.* and *Luster v. Middlecoff et als*, *id.* 54.

25. A forthcoming bond has the force of a judgment only from the time the bond is returned to the clerk's office, and in a case where there was no evidence when the bond was returned, the date of the execution which issued on it was taken as the date of the return. *Jones, &c. v. Myrick's Ex'ors*, 8 Grat. 179. *Myrick's Ex'ors v. Epps et als.*, *id.*

26. A forfeited forthcoming bond not returned to the clerk's office until some day after the first in the term, when there is an award of execution thereon, does not relate back to the first day of the term. *Ibid.*

27. Though a forthcoming bond is forfeited and not quashed, yet in

equity the lien of the judgment still exists; and if the obligors in the bond prove insolvent so that the debt is not paid, a court of law will quash the bond and thus revive the lien of the original judgment; and a court of equity having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment. *Ibid.*

28. A forthcoming bond is signed by the debtor, a third person and the creditor in the execution. The bond is valid to bind the debtor and the first surety, but the first surety is only a co-surety with the creditor and is entitled to contribution from him. If the debtor proves insolvent, the first surety may be relieved to the extent of one half the debt either by bill in equity or by motion under the statute for the relief of sureties. *Booth v. Kinney*, 8 Grat. 560.

29. In such a case the notice on the forthcoming bond is not defective for failing to name the obligee as a co-obligor. *Ibid.*

30. A bond binding the heirs, given to an endorser to protect him from loss on account of his endorsement, will, on the death of the obligor, be an available security for simple contract creditors of the obligor to the extent that the notes endorsed by said endorser are paid out of the personal assets. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

31. In a declaration on a constable's official bond, the assignment in the breach did not set out specifically the claims put into the constable's hands but stated that the relator had placed divers claims in his hands for collection, which were particularly set out in a receipt given by him as constable, and which was thereto annexed, marked A.; and then proceeded to aver the collection of the moneys by the constable and his failure and refusal to pay over to the relator. The breach was well assigned. *Governor for Davis v. Roach et als.*, 9 Grat. 13.

32. In an action on an appeal bond the declaration states under a *scilicet* the costs at a certain sum and makes *profert* of the record of the Court of Appeals. The defendant craves *oyer* of the record and demurs generally. The record is properly set out in all respects, but the costs endorsed by the clerk of the Court of Appeals is less than the sum stated in the declaration; that sum including the costs for entering the judgment of the Court of Appeals in the Circuit Court and issuing execution upon it. Held: 1st. The *profert* of the record did not extend to the endorsement of the costs by the clerk, and the variance as to the costs was no ground of demurrer. 2nd. There was no variance, as the costs in the Circuit Court were properly embraced in the demand in the declaration. *Friend v. Woods*, 9 Grat. 37.

33. A bill of injunction is dismissed at rules: an action may be brought on the injunction bond before the order dismissing the bill is confirmed by the Court. *Roach v. Gardiner*, 9 Grat. 89.

34. In a case in which there is a joint judgment against two persons, who have been arrested and committed to prison, there may be a prison bounds bond, jointly executed by them. *McGuire et als. v. Pierce, assignee, &c.*, 9 Grat. 167.

35. It is no defence to an action on a prison bounds bond that the prisoner after a departure, voluntarily returned to the rules and then remained, &c.; or that he voluntarily returned to the jail, &c.; or that the jailor made fresh pursuit after the prisoner and recaptured him and committed him to jail, or that the prisoner accidentally walked sixteen feet beyond the limits of the prison bounds, which were bounded by an imaginary line and thereupon immediately returned, &c. *Ibid.*

36. An endorsement of the name of the sheriff on a prison bounds bond is a sufficient assignment and the measure of damages to be given to an assignee in such a case is the debt, interest and costs. *Ibid.*

37. An endorsement on a bond, made by the obligor therein and under seal though made after the execution of the bond is to be considered as part of it. *Price v. Kyle*, 9 Grat. 247.

38. The bond of a deputy sheriff and his sureties to the high sheriff for the faithful discharge of his duties, omits in the penalty and condition, to designate the deputy, so that the condition reads as if all were deputies. The obligors having sealed and delivered the bond in that shape, they are estopped from denying that they are deputies. *Cox et als. v. Thomas' Adm'r*, 9 Grat. 312.

39. Each obligor named in the penalty of the bond must in such case, be regarded as principal, so far as his acts are concerned and the others as his sureties; and although some of the persons named in the penalty did not sign the bond, the parties who did sign it are to be considered as the obligors who are bound and are recited to be admitted as deputies. *Ibid.*

40. The signing of a bond by a party whose name is not in the penalty, does not vitiate the bond, and the signer is bound as an obligor and the bond stating that the plaintiff in the suit was high sheriff and the party proceeded against a deputy, it estops the obligors from denying these facts. *Ibid.*

41. All the obligees in a joint bond must join in an action upon it, or some sufficient excuse for not joining them must be stated in the declaration. *Strange v. Floyd*, 9 Grat. 474.

42. A bond is given by a deputy and his sureties to indemnify the high sheriff against all loss and damage he may sustain in consequence of any failure or misconduct on the part of the deputy or any other person whom he may employ to assist him in the office. The high sheriff being liable for rents of land which came to the hands of the deputy, and one of his assistants, the sureties are liable to the high sheriff, though the rents came

to the deputy after the high sheriff's term expired and came to the hands of the assistant deputy after the principal deputy had died. *Miller v. Jones et als.*, 9 Grat. 584.

43. *Monomania*, in no way connected with the subject of a contract, will not invalidate a bond and deed of trust given in pursuance and execution of the contract. *Boyce's Adm'r v. Smith*, 9 Grat. 704.

44. There are three principal obligors in a bond and two of them put money into the hands of a third to pay it, and he undertakes to pay it. As between the three, the third is the principal obligor and the other two are his sureties. *Buchanan v. Clark et als.*, 10 Grat. 164.

45. The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped thereby from denying that their principal was deputy, unless the bond is invalid. *Cecil v. Early et als.*, 10 Grat. 198.

46. The bond of the deputy is not avoided by the fact that the County Court did not enter upon the record that he was a man of honesty, probity and good demeanor, and that he did not take the several oaths of office required by law to be taken by a deputy sheriff. *Ibid.*

47. A paper intended to be a bond, is signed in blank as to the sum, by a person as surety, and the blank is afterwards filled up in his absence, without his knowledge and without any authority from him. It is not his bond. *Rhea v. Gibson's Ex'or*, 10 Grat. 215.

48. A covenant by the holder of a bond with the principal obligor to give a specific time for payment, does not release the surety at law. His only remedy is in equity. *Devers v. Ross*, 10 Grat. 252.

49. A bond is executed for money lent, to be paid in a short time by a debtor of the obligor. The debtor of the obligor pays the debt and takes up the bond. It is thereby extinguished, and if in a future settlement by the borrower and his debtor, this item is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower. *Young for &c. v. Johnston*, 10 Grat. 269.

50. An endorsement on a bond being equivocal in its character, all the circumstances attending the transaction, the contemporaneous conduct and declarations of the parties, evidence of their purposes and motives may be looked to, in order to ascertain what kind of instrument was within their contemplation and design. *Smith's Ex'or v. Spiller*, 10 Grat. 318.

51. The following endorsement was written on the back of the last mentioned bond: "*Memorandum*, if I do not collect the money due on the within note of my nephew during my life, then it is never to be collected; and I give it to him;" and was signed by the obligee. Held: this endorsement is part of the bond and irrevocable without destroying it. *Ibid.*

52. A bond given to indemnify a surety for costs in another state, recites that the obligee is such surety. The obligors in the bond are estopped from denying that the obligee was such surety. *Cordle v. Burch*, 10 Grat. 480.

53. The obligor in a bond may commit larceny in taking it. *Vaughan's case*, 10 Grat. 758.

54. An award of execution on a forthcoming bond cannot be successfully resisted on account of the original judgment, unless such judgment is null and void. *Pates v. St. Clair*, 11 Grat. 22.

55. Upon a trial at law, the defendant introduces in evidence a bond on which a receipt is endorsed, which is attested by a witness. The receipt is evidence for the defendant without calling the witness. *B. Staton v. Pittman, Sh'ff, and Pittman, Sh'ff v. R. Staton*, 11 Grat. 99.

56. A bond executed to an executor is transferred by him to a guardian, as part of his ward's estate. Whatever interest the ward has in the bond, is subject to the control of the guardian, who may receive the money if voluntarily paid,; may sue for it in a common law court in the name of the executor, for his own use as guardian, and he cannot be prevented by the executor; or he may sell or transfer the bond: *Hunter v. Lawrence's Adm'r et als.*, 11 Grat. 111.

57. A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or the grantee. *Lee's Ex'or v. Boak*, 11 Grat. 182.

58. A surety in a forthcoming bond is a surety for the debt, and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, existing at the time he became bound for the debt; and the judgment, (for the benefit of the surety so paying), is not extinguished but is transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate, owned at the date of the judgment or afterwards acquired. *Hill v. Manser et als.*,\* 11 Grat. 522.

59. The surety in a forthcoming bond, pays to the creditor a sum certain on the execution issued on the bond against the principal debtor and himself and takes a receipt as for money paid by him. The evidence of payment afforded by the receipt, will not be repelled by proof of loose declarations that he had loaned the money to the principal debtor, who was his brother; so as to deprive him of the right to be substituted to the rights and remedies of the creditor. *Ibid.*

60. Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond. *Nelson's Adm'r v. Cornwall*, 11 Grat. 724.

\* See Code, p. 709, chap. 186, §§ 5, 6, 7, 8.

## BOUNDARIES.\*

1. A sovereign state owning the country on both sides of a large navigable river, grants the country northwest of the river to another sovereign state. *Quære*: Is the grant bounded on the river by the top of the bank, or the edge of the water or low water mark. *Commonwealth v. Garner et als.*,† 3 Grat. 655.

2. A division line between two tracts of land was intended to be straight, but owing to the thick wood was marked a curved line. The straight line and not the marked line, is the true division line. *Smith v. Davis*, 4 Grat. 50.

3. A court of equity will not try the title to nor settle the boundaries of land. *Carrington et als. v. Otis et als.*, 4 Grat. 235.

4. Virginia cedes to the United States two hundred and fifty acres of land at Old Point Comfort, and by statute directs the Governor to convey it. He directs a survey of the land and upon the report of the surveyor executes a deed to the United States and takes the courses and distances from the report, but does not refer to it in terms. In determining the boundaries of the land ceded to the United States, the statute, the report, and the deed, are all to be looked to, to ascertain what boundary was intended. *French v. Bankhead*, 11 Grat. 136.

5. Looking to the statute, the report and the deed, it appears that the intention was to convey by the high water mark, and that is the boundary of the conveyance: and under the act 1 Rev. Code, 1819, chap. 87, p. 341, the conveyance to the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark. *Ibid.*

## BRIDGES.‡

1. A public bridge can be established by a county court only in the mode prescribed by the statute, 2 Rev. Code, chap. 236, § 7, p. 236. *Sampson v. Goochland Justices*, 5 Grat. 241.

2. A bridge erected by an individual for the public benefit, or for his own purposes and dedicated by him to the public, may be established by the county court as a public bridge, but only in the mode prescribed by the statute. *Ibid.*

3. The record of the court must shew that the order establishing a bridge was made by a county court, constituted in accordance with the directions of the statute, or the order will be invalid. *Ibid.*

\* See Code, p. 49, chap. 1, § 2.

† The question of the boundary between the states of Virginia and Ohio is elaborately investigated in the opinions of the judges in this case.

‡ See Code of Virginia, p. 336, chap. 64, § 27 to § 32.

4. The county court is not bound to repair or maintain a bridge erected by an individual, with whatever view to the public advantage, and though dedicated to the public use, and used by the public, and although on a public road, unless it has been adopted by the county court in the mode prescribed by the statute. *Ibid.*

5. If an individual without authority, for his own purposes, or even for the public advantage, constructs a bridge on a public road, it is incumbent on him to keep it in such condition as not to impede the free and convenient use of the highway; and if he suffers it to become ruinous, so as to operate as an obstruction, he becomes guilty of a nuisance for which he is liable, but the county court can not be compelled to maintain the bridge. *Ibid.*

6. An order of a county court directing a bridge to be repaired or rebuilt, is not evidence that the bridge had been previously established; nor is it sufficient to establish the bridge unless the record shews that the court was properly organized for that purpose. *Ibid.*

---

### BURGLARY.\*

1. The only covering to an opening for a window is a cloth hung on two nails at the top and loose at the bottom. *Quære*: If the removing the cloth from one of the nails is a sufficient breaking to constitute burglary. *Hunter's case*, 7 Grat 641.

---

### CAPIAS.

1. The common law writ of *capias pro fine* is unrepealed and may be used by the commonwealth, and where there is a judgment in favor of the commonwealth for a fine, and costs of prosecution, the writ may issue for the fine and costs; but when the judgment is for costs only, the writ is not a proper process to enforce the judgment. *Webster's case*, 8 Grat. 702.

2. Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. But the term of imprisonment under such *capias* is limited by the provisions of the Code. Ch. 209, § 17, p. 781.

---

### CARRIERS.†

1. Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprioritor of the coach; and they are bound to use the utmost diligence and care of cautious persons, to prevent injury to the passengers. *Farish & Co. v. Reigle*, 11 Grat. 679.

\* See Code, p. 728, 9, chap. 192, § 11 to 13 inclusiv.

† As to suit against, see Code, p. 588, chap. 147, § 1. *Id.* p. 644, chap. 170, § 8. Punishment for embezzlement by. *Id.* p. 730, chap. 192, § 21.



2. Where a passenger is injured by the upsetting of the coach, the presumption is that it occurred by the negligence of the driver; and the burden of proof is on the proprietor of the coach, to show that there was no negligence whatever. *Ibid.*

3. Though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet if the upsetting of the coach was caused by the running off of the horses, and such running off of the horses might have been avoided, if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach will be liable for the injuries sustained by the passengers. *Ibid.*

4. If the coach was upset by the running off of the horses, and if they ran off not because they were accidentally frightened, but because the blocks were out of the brake, causing the coach to run upon them; and if the running off of the horses might have been prevented, if they had been properly harnessed, or if the utmost care and diligence of a careful person had not been used to secure the blocks in the brake, the proprietors are liable. *Ibid.*

5. Carriers of passengers by stages are bound to provide, not only good stages, harness and equipments of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers. *Ibid.*

6. If the coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. *Ibid.*

7. In actions by passengers against carriers for injury sustained, the judgment of the jury, as to the amount of damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Ibid.*

8. A common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order; but from the effects of a storm a small part is delivered in a damaged condition, and another small portion is lost. In an action by the common carrier for freight, he is entitled to recover under the common *indebitatus assumpsit* count, the agreed price for the whole quantity so delivered or lost, if the loss or damage were occasioned by inevitable accident. *Galt v. Archer*, 7 Grat. 309.

9. But in such a case, if the loss or damage were occasioned by the negligence of the carrier, or could have been prevented by proper care and

diligence on the part of the carrier, then the defendant would be entitled to the full amount of the loss and damage by way of set off. *Ibid.*

10. The act of God, which excuses a common carrier, must be a direct and violent act of nature; and if its operation might have been foreseen and avoided by human foresight and diligence, the carrier is liable. *Friend et als. v. Woods*, 6 Grat. 197.

11. A common carrier on the Kanawha river strands his boat upon a bar recently formed in the ordinary channel of the river, of the existence of which he was previously ignorant; he is liable for the damage done to the freight on board. *Ibid.*

---

### CASE.

1. A. had cut wood on the land of B. with his approbation, and the wood was lying on B.'s land. B. set fire to the brush on another part of his land for the purpose of burning the brush; the fire escaped from his control and passed to the land where A.'s wood was and consumed it: Held: Trespass *vi et armis* would lie by A. against B. for this injury. *Jordon v. Wyatt*, 4 Grat. 151.

2. Case is a proper remedy for the breach of an express warranty of soundness of a slave, or other personal property. *Trice v. Cockran*, 8 Grat. 442.

3. In case for a breach of warranty of soundness of a personal chattel, it is not necessary to allege the defendant's knowledge of the unsoundness; and if it is alleged, it is not necessary to prove it. *Ibid.*

---

### CAVEAT.\*

1. In a case of caveat, the caveator must show the better right in the land to be in him. He can not recover on the weakness of his adversary's title. *Walton v. Hale*, 9 Grat. 194; *Harper & Weston v. Baugh & Sequine*, *Id.* 508.

2. *Quere*, If a tenant in common of an undivided interest in land may not maintain a caveat against the issuing of a grant to a third person, upon a survey of part of the land embraced within the limits of the grant in which he holds an undivided interest. *Walton v. Hale*, 9 Grat. 194.

3. The caveator must state in his caveat, the grounds on which he claims the better right to the land in controversy; and he will not be permitted to abandon on the trial the right which he has set out in his caveat, as that

\* See Code, p. 483-4, chap. 112, §§ 24 to 35 inclusive. *Id.*, p. 488, chap. 112, §§ 57-8.

under which he claims; and prove a different right. *Harper & Weston v. Baugh & Sequine*, 9 Grat. 508.

4. In a caveat the court can not enter into questions of fraud or notice between the parties. *Ibid.*

5. In a caveat where the objects called for in the entry are not of such public notoriety, as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence and are such as is required to make a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry. *McNeel v. Herold*, 11 Grat. 309.

6. A party who files a caveat must show a title to the warrant under which his own entry and survey was made; and if he fails to do so, his caveat will be dismissed. *Ibid.*

---

## CESTUI QUE TRUST.

1. In a suit by a party claiming, under an adverse title, property which has been conveyed to trustees for the payment of debts, to which only the grantor and trustees are parties defendants, a decree in the cause in favor of the plaintiff does not bind the *cestuis que trust*. *Commonwealth v. Ricks et als.*, 1 Grat. 416.

2. A Court of Equity will not entertain a suit by a trustee, or *cestui que trust*, against purchasers of the trust property claiming adversely, there being no obstacle in the way of proceeding at law. *Sheppard v. Turpin*, 3 Grat. 373.

3. Property conveyed in a deed of trust is taken under execution and sold; after five years possession, the purchaser is protected by the statute, against the action of the trustee, or *cestui que trust*, to recover it. *Ibid.*

4. If the statute of limitations will bar the suit of the trustee for the trust property, it will equally bar the *cestui que trust*. *Ibid.*

---

## CHANCERY JURISDICTION.

See EQUITABLE JURISDICTION.

---

## CHESAPEAKE AND OHIO CANAL CO.

1. The inquisition taken under §15, of the act 1823-4, incorporating the Chesapeake and Ohio Canal Co., should state specifically and separately

the value of the land condemned, in perpetuity, and the quantity and quality of the estate in the land condemned for temporary purposes; and should also state separately, the damages estimated on each separate source of damage; so that the inquisition will ascertain the damages which have been estimated; and will protect the Company from any future demand for these damages. *Chesapeake and Ohio Canal Co. v. Hoy et als.*, 2 Grat. 511.

2. An appeal lies from the judgment of the County Court confirming an inquisition taken under said act. *Ibid.*

---

### CHOSES IN ACTION.

1. The wife's remainder in slaves is sold by her husband, who dies in the life-time of the life-tenant, leaving his wife surviving. She is entitled to the slaves as against the purchaser for value from the husband. *Moore v. Thornton et als.*, 7 Grat. 99.

2. Though the purchaser from the husband acquires the interest of the life tenant in one of the slaves in the life-time of the husband, yet the wife surviving, is entitled to the slave. *Ibid.*

---

### CIRCUIT SUPERIOR COURTS.

See COURTS.

---

### CLERKS.

1. A clerk who takes a defective bond from a guardian, is not a proper party to a suit for the settlement of the guardian's account. *Austin v. Richardson*, 1 Grat. 310.

2. A clerk has no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties. *Matthew Williamson's case*, 4 Grat. 554.

3. The authority of a clerk to administer an oath only extends to cases in which, without regard to circumstances, the taking the affidavit is a necessary pre-requisite to the performance of the official act the clerk is called on to perform. *Ibid.*

4. The clerk of the Court of Appeals, when acting as a clerk of the special Court of Appeals, constituted under the act of the 15th March, 1832, is not entitled to demand from the State, for any services which he may render in such special court, any other compensation than the annual allowance which shall be made to him by the Judges of the Court of Appeals, as clerk of that court. *Allen v. Commonwealth*, 6 Grat. 529.

5. The act, Code of Va., p. 783, § 11, only subjects the prisoner to such costs as the Commonwealth is bound to pay; and, therefore, does not embrace the fees of clerk, sheriff, or attorney of the Commonwealth. *Anglea, &c. v. Commonwealth*, 10 Grat. 696.

---

### CO-DEFENDANTS.

1. A Court of Equity will decree over in favor of a purchaser of land, who has been deprived thereof, against his grantors, they being parties to the suit, and his right to relief arising upon the pleadings and proofs between the plaintiff and said purchaser and his grantors, although the said purchaser has a remedy, at law, upon the warranty in his deed. *Mundy v. Vawter et als.*, 3 Grat. 518.

2. The practice of decreeing between co-defendants will not be extended further than it has already been carried. *Law's Ex'ors v. Sutherland*, 5 Grat. 357.

3. In a bill by a creditor against an administrator and his sureties, charging a *devastavit* by the administrator and the liability of the sureties for it, though some of the sureties insist in their answer that under the circumstances one of the sureties is liable to the others, if they are liable to the plaintiff, though there is a decree for the plaintiff, and though it appear from the proofs that the *devastavit* was occasioned by the payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a proper case for a decree between co-defendants. *Allen and Ervine v. Morgan's Adm'r et als.*, 8 Grat. 60.

4. An administrator assigns a bond to executors in satisfaction of a debt due from his intestate to their testator, judgment is recovered by them on the bond and enjoined by the obligor, on the ground of equity, against the administrator's intestate. In the injunction suit, the said executors, the executor of the administrator who had since died, and the administrator *de bonis non* of the said intestate, are parties, and they consent to a decree perpetuating the injunction, and also to a decree directing the last named executor and the administrator *de bonis non* to settle their accounts of administration upon the estate of the latter's intestate. Held: that it is a case in which there may be a decree between co-defendants in favor of the first named executors against the estate of the intestate. *Braxton's Adm'r, &c. v. Harrison's Ex'ors*, 11 Grat. 30.

5. In a case where the equities between the parties defendant do not arise out of the pleadings and proofs between the plaintiffs and defendants, there be no decree between the co-defendants. *M. Blair v. Thompson et als.*, 11 Grat. 441.

---

### COMMISSIONERS.

1. The powers of commissioners appointed to execute a decree of a Court

of Chancery, cease when the court by which they are appointed is abolished or ceases to exist. *McLaughlin v. Janney et als.*, 6 Grat. 609.

2. Commissioners proceeding to execute a decree after an appeal to the Court of Appeals has been taken, and the process has been served upon them, are guilty of a contempt of the Appellate Court, and their acts are null and void, so far as they affect the rights of the parties to the appeal. *Ibid.*

3. Heirs out of the state instituted suit for a sale of land descended to them; the lands being sold and the proceeds of sale in the hands of a commissioner. A creditor of the ancestor seeking to subject these proceeds, should petition to be made a party in the cause, and to have the funds applied to the satisfaction of his debt. Or if he proceeds by foreign attachment, the commissioner should be a party and restrained by endorsement on the process from disposing of the proceeds. Or enjoined if the creditor proceeds against the heirs to marshal the assets. And the commissioner though a party, as administrator of the debtor, to the creditor's suit, but without actual notice of the object of it, and not made a party as commissioner, paying over the money to the heirs, under the order of the court whose commissioner he was, will not be liable to the creditor. *Carrington et als. v. Didier, Norvell & Co.*, 8 Grat. 260.

---

### COMMISSIONERS' REPORT.

1. Exceptions are taken to a commissioner's report, and the court without passing upon the exceptions re-commits the report. The re-committed report is not excepted to. The exceptions to the first report are waived and cannot be considered in the Appellate Court. *Kee's Ex'or v. Kee's Creditors*, 2 Grat. 116.

2. A commissioner to whom accounts are referred gives notice to the parties by publication in a newspaper, of the time and place of taking the accounts. An exception by a party for want of personal notice, where that was practicable, should not be sustained, unless he shows by his affidavit, or otherwise, that he had not such information of the taking of the accounts as would have enabled him to attend. *McCandlish Adm'r, &c. v. Edloe et als*, 3 Grat. 330.

3. In taking an account, the commissioner may take the depositions of witnesses to enable him to act on the subject under his general notice. *Ibid.*

4. When an interlocutory decree merely confirms generally, a report containing alternate statements, the court reserves to itself the power of selecting, by its future decree, between such statements, and decreeing accordingly. *Ibid.*

5. A claim of a creditor not reported on by the commissioner, may be

directed to be considered as a claim stated in the report; and will be open to all just exceptions. *Ibid.*

6. A decree against an administrator being for six *per cent.* when it should have been for five *per cent.*; and this appearing on the face of the commissioner's report, which was the basis of the decree and not being susceptible of being repelled by extrinsic evidence, it will be corrected by the Appellate Court, though not excepted to in the Court below. *Wills' Adm'r v. Dennis' Adm'r*, 5 Grat. 384.

7. The authority on which a commissioner's report was made not having been questioned in the court below, and that court having made its decree upon the report; the Appellate Court will presume it was made by proper authority, though no order of account appears in the record. *Ibid.*

---

## COMMON CARRIERS.

See CARRIERS.

---

## COMMONWEALTH.

1. The act of 16th April, 1831, Sup. Rev. Code, ch. 109, § 31, p. 148, which limits the right of appeal to the Court of Appeals to five years, applies to the Commonwealth.\* *Commonwealth v. Moore*, 1 Grat. 294.

2. Prior to the act of 1822, Sup. R. C., ch. 282, § 1, a judgment in favor of the Commonwealth against its general debtors, only bound one moiety of the debtor's lands.† *Leake v. Ferguson*, 2 Grat. 419.

3. The judgment lien does not give title to rents and profits before a decree. *Ibid.*

4. In a prosecution for selling ardent spirits by retail, to be drunk at the place where sold, without having obtained a license to keep an ordinary, a writ of error lies for the Commonwealth from the judgment of an inferior court. *Scott's case*, 10 Grat. 749.

5. Time does not run against the Commonwealth. *Levasser v. Washburn*, 11 Grat. 572.

---

## COMPENSATION.

1. A husband surviving his wife, acting *bona fide* and under the belief that certain real estate, to which his wife once had an equitable title, belonged to himself, sells the same to *bona fide* purchasers without notice.

\* Code of Va., chap. 182. § 3, p. 683.

† Code of Va., chap. 42, § 10, p. 223.

It is held afterwards that the estate belonged to the heirs of the wife, subject to his life estate. *Quære*, what is the measure of compensation to the heirs of the wife for the land? Is it the value of the land at the time of the sale; or the value thereof, excluding the permanent improvements made thereon since the sale, at the death of the husband? \* *Norman's Ex'or v. Cunningham and wife et als.*, 5 Grat. 63.

---

### CONCEALED WEAPONS.

1. A jury may well find a general or habitual wearing of concealed weapons, from evidence that the defendant was once seen wearing them under circumstances which satisfied the jury that it was his general practice. *Hick's case*, 7 Grat. 597.

---

### CONDITIONS.

1. An award made in a cause pending in a Court of Equity directs the plaintiff to pay to the defendant a sum of money, with interest; and that the defendant, within ninety days after the award shall be entered as the decree of the court, shall convey to the plaintiff's wife a good title to the land in controversy; and if he fails to do so, he shall pay her \$1,500. The award is entered as the decree of the court. This is a final decree; and the defendant must make the conveyance in ninety days, or he will be bound to take the property and pay the money. *Davis v. Crews*, 1 Grat. 407.

2. *Quære*. If a Court of Equity will relieve against a condition precedent, where the subject admits of compensation, or the parties can be placed in the same condition, in which they would have been if the condition had been performed, and there has been a substantial performance of the condition. *Columbian College v. Clopton's Adm'r, &c.*, 7 Grat. 168.

3. The penalty and condition of a bond for the payment of money, is in the same sum. It is proper to treat it as a single bill and to give judgment for the amount of the bond, with interest from the time of payment. *Fleming v. Toler*, 7 Grat. 310.

4. A principal executes a bond, binding his heirs, to his surety as endorser, with condition that he will, when requested by the bank or the surety, pay off the notes and so indemnify and save the surety harmless: and he dies leaving the notes not yet due. They are protested as they fall

\* In this case the Court of Appeals being equally divided as to the period at which compensation for the value of the land should be decreed, the decree of the court below stood confirmed, giving to the heirs of the wife compensation for the value of the land, excluding the permanent improvements made thereon since the sale, at the death of the husband.



due and are afterwards paid by his administrator. The surety being entitled to resort to both the real and personal estate and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled to the extent of the notes so paid, if they do not exceed the penalty of the bond. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

5. In a covenant for the sale of land, possession is to be delivered on a day certain. The last payment is to be made on another day certain subsequent and on the completion of said payments the vendor is to convey. The two last are dependant covenants, and in an action by the vendor to recover the money, he must aver either that he had executed or that he had tendered the deed. The averment that he was ready and willing to convey is not sufficient. *Roach v. Dickinson's*, 9 Grat. 154.

6. A testator by his will emancipates his slave at a specified future period: provided she shall leave the State within six months thereafter. But if she does not leave the State within the six months, then she is to become a slave to his estate for ever: and provided, that the laws of the State shall so require her to leave it. Held: that the condition is void; and she is free though she does not leave the State within six months after the time specified. *Forward's Adm'r v. Thamer*, 9 Grat. 537.

7. A legacy of a remainder in property is given on condition that the legatee, a female, shall remain a member of the society of friends. By a marriage with any other than a member, she would cease to be a member of the society. There being but five or six single men, members of the society, in the neighborhood of the legatee, when she became of a marriageable age; the condition is an unreasonable restraint upon marriage and void. *Maddox et als. v. Maddox Adm'r et als.*, 11 Grat. 804.

8. There being no bequest over, and no specific direction that upon breach of the condition, the legacy shall fall into the residuum of the estate, the condition is *in terrorem* merely and does not defeat the legacy. *Ibid.*

9. The bequest of a legacy being upon a condition requiring a religious qualification, the condition is against the policy of the laws of Virginia and therefore void. *Ibid.*

10. *Quære*: If the condition be a condition precedent, can the legatee take the legacy free from the condition, or does the legacy lapse? It seems the legatee would take a legacy of personal property, but a devise of land would fail. *Ibid.*

---

## CONDITIONAL SALE.

By an agreement in writing A. agrees to pay to B., on demand, a certain sum, and B. agrees to leave a negro boy with A. until a certain

time, at which time B. is to refund the money and take back the negro, or if not to receive the balance which the boy may then be worth and make a good title to him. Held: That this was a conditional sale and not a mortgage. *Strider v. Reid's Adm'r*, 2 Grat. 39.

See "CONTRACTS" and "COVENANTS."

## CONFESSIONS.

1. The confessions or admissions of an accomplice in a felony made after the commission and completion of the offence are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony have been proved. *Hunter's Case*, 7. Grat. 641.

2. On a trial for felony a confession of the prisoner may be given in evidence, unless it appears that the confession was obtained from the prisoner by some inducement of a worldly or temporal character, in the nature of a threat or promise of a benefit held out to him, in respect of his escape from the consequences of the offence, or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such person. *Smith's Case*, 10 Grat. 734.

3. A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such and no way affected by the offence, is not a person in authority, in the sense of the rule which excludes confessions made to persons in authority. *Ibid*.

## RELIGIOUS CONGREGATIONS.\*

1. Circuit Courts may try offences against the statute, 1. Rev. Code ch. 141, forbidding the disturbance of congregations assembled for religious worship. *Jennings' Case*. 3 Grat. 624.

2. The statute is applicable, not only to disturbances made whilst the religious services are progressing, but to disturbances made whilst the congregation is assembled for religious worship; though it be at night after the religious services are closed for the day and the congregation have retired to rest. *Ibid*.

## CONSIDERATION.

1. The payment of money to a surveyor of a county, for which he is to furnish a warrant and enter and survey a specific piece of land is not a sufficient consideration for a promise by his successor to do these things, to

\* See Code of Virginia, Chap. 77. *Id.* Chap. 196. § 18.

support an action of *assumpsit* against the successor. *Hale v. Crow and wife*, 9 Grat. 263.

2. The mere statement in writing of the assignor without consideration, of a bond, that he is aware of no offset or objection to said bond nor any thing to affect his liability as assignor thereof is not sufficient to support an action of *assumpsit* by the holder against assignor, and a count in a declaration setting forth that fact as the consideration of the *assumpsit* is bad on demurrer. *Hopkins, Brother & Co., v. Richardson*, 9 Grat. 485.

3. R., the obligee in a bond endorses his name on the back thereof, for the purpose of enabling K. to buy goods on the faith of his endorsement, and H. sells goods to K. on the faith of the same; and before the time for the payment of the goods arrives, the obligor becomes insolvent. H. may maintain *assumpsit* against R. either as assignor or guarantor, and his undertaking is not one to which the statute of frauds and perjuries applies. *Ibid.*

4. In order to entitle a party to recover back money which has been paid upon a contract which has been wholly rescinded or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction. *Johnson's Ex'or. v. Jennings Adm'r.* 10 Grat. 1.

5. A deed from a husband to his wife, conveying to her all his property, real and personal, under circumstances showing a strong meritorious consideration, though void at law as being from a husband to his wife, will be set up in equity against the heir at law. *Jones and wife v. Obenchain et als.* 10 Grat. 259.

6. The administrator of G. assigns a bond to executors in satisfaction of a debt due from his intestate to their testator, judgment is recovered by them on the bond and enjoined by the obligor on the ground of equity against G. In the injunction suit, the said executors, the executor of the the administrator who had since died, and the administrator *de bonis non* of G. are parties, and consent to a decree perpetuating the injunction, and also to a decree directing the last named executor and the administrator *de bonis non* to settle the accounts of the estate of the latter's intestate. There was also a decree in favor of the executors against the estate of G. Ten years after the decree, the second administrator *de bonis non* of G. entered into a contract under seal to pay the debt out of the assets when received; and the said executors agreed to wait one year, to release their costs in the suit and dismiss it as to them. But the administrator was not to be bound personally, and the executors were at liberty, if the money was not paid in a year, to cancel the agreement. The administrator did not collect assets within the year, and the executors sued in equity upon the agreement. Held. That though it is generally true that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estates, on which a suit may be maintained. Also:

That there was a sufficient consideration to sustain the agreement, and the suit could be maintained on it by the executors against the administrator for payment out of the assets. *Braxton Adm'r., &c. v. Harrison's Ex'ors.* 11 Grat. 30.

---

### CONSIGNOR AND CONSIGNEE.

1. An account of sales rendered by a consignee to his consignor is *prima facie* evidence of its correctness, though objected to by the consignor at the time of its presentation by the agent of the consignee. *Mertens v. Nottebohm*s, 4 Grat. 163.

2. Quære: If a consignee who has made advancements to his consignor on a shipment of goods made to the consignee, may recover the amount of these advancements, without showing what he has done with the goods. *Ibid.*

---

### CONSPIRACY.

What facts are insufficient to establish a conspiracy between the prisoner and a third person to commit an offence, so as to let in the declarations of such third person as evidence against the prisoner; such declarations being made in the absence of the prisoner. *Williamson's Case*, 4 Grat. 547.

---

### CONSTABLE.

1. A justice of the peace has jurisdiction to hear a motion and give judgment against a constable and his sureties for the failure of a constable to pay over money collected on execution.\* *Hendricks v. Shoemaker*, 3 Grat. 197.

2. One joint notice to a constable and his sureties upon the default of the constable in several cases is sufficient, and the justice should give a separate judgment in each case. *Ibid.*

3. A constable is an officer appointed for the whole county, and although he is prohibited by law under a penalty from executing process out of his precinct, yet his official acts in any part of the county are valid; and he and his sureties are responsible therefor. *McNeale et als. v. Governor for Clarke*, 3 Grat. 299.

4. The receipt of a constable for a debt, claim or execution is evidence against the constable and his sureties, that the debt, &c., has come to his hands, though such receipt does not purport to be given in his official character. *Ibid.*

\* See Code of Virginia, Chap. 167. § 4, p. 639.

5. If such receipt upon its face purports to have been given by the constable in his official character and six months have elapsed from the date thereof, before the commencement of the action, such receipt is *prima facie* evidence of the receipt of the money by the constable, when the debt, claim or execution was placed in his hands to be warranted for, and was such as might have been recovered by warrant.\* *Ibid.*

6. If such receipt of a constable in his official character, is for a debt or claim other than an execution, it will be intended, unless the contrary appears, that it was placed in the hands of the constable to be warranted for, and that it might have been recovered by warrant. *Ibid.*

7. If the receipt of the constable does not shew who was the plaintiff in the execution, or in the case of any other debt, who was the creditor entitled to maintain a warrant in his own name, it should be intended that the person to whom the receipt was given was the plaintiff in the execution or the creditor who could maintain the warrant in his own name, unless the contrary is made to appear by proper evidence. *Ibid.*

8. If the receipt is given for an execution not in the name of the relator in the action, or for a debt or claim for which the relator could not maintain a warrant in his own name, then the receipt is not admissible evidence to maintain the action of the relator. *Ibid.*

9. A receipt of a constable for such claims as are properly put in his hands to be collected according to law, signed by him with initials appended to his name, which stand for constable of his County, sufficiently indicates the official character of the receipt. *Ibid.*

---

## CONSTITUTIONALITY OF LAWS.

1. An act requiring the county Court to lay a levy upon the titheables of the County for the purpose of improving the navigation of a stream lying within it, though passed without the assent of the people of the county is constitutional. *Harrison, justices v. Holland*, 3 Grat. 247.

2. The act 31st March, 1848, Sess. Acts, p. 51, establishing a special Court of Appeals constituted of Judges of the Circuit Courts is constitutional. *Sharpe v. Robertson*, 5 Grat. 518.

3. A *per diem* compensation to the Judges holding the Special Court for the time, they sit therein, in addition to their salaries as Judges of the Circuit Court, is constitutional. *Ibid.*

4. The Constitution of Virginia does not, of itself give jurisdiction over any class of cases, to either the Supreme Courts of Appeals or the District Courts of Appeal. The jurisdiction is to be conferred by statute. *Barnett v. Meredith, judge*, 10 Grat. 650.

\* See Code of Virginia, chap. 49, § 40, p. 253.

5. The act, Sess. Acts 1851-52, chap. 66, § 23, p. 58, which directs that the Circuit Court of Henrico shall be held at the State Court-House in the City of Richmond, is not a violation of § 7 of the Constitution of Virginia. *Scott's case*, 10 Grat. 749.

---

### CONSTRUCTION.\*

1. The word "month" in a statute is to be construed as a calender month. *Brown v. Harris et als*, 5 Grat. 285.

2. The word "survivor" used in a will, if the will does not indicate another intent, is to be construed as referring to the death of the testator. *Martin's adm'r, &c. v. Kirby, adm'r, &c. et als*, 11 Grat. 67.

3. In construing the Code of 1849, the rule of construction is, that the old law was not intended to be altered unless such intention plainly appears. *Parramore v. Taylor*, 11 Grat. 220.

4. If parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense. *Findley's ex'ors v. Findley*, 11 Grat. 434.

5. The word "may" in act Code, Ch. 96. § 3. p. 443, in relation to granting a license to keep a tavern, is not imperative. *Yeager ex parte*, 11 Grat. 655.

6. In construing a will, if the language be popular and ordinary, its meaning is to be according to its usual acceptation; but if technical, legal terms be used, they are to be construed in the sense which the law affixes to them. *Robinsons v. Allen et als*, 11 Grat. 785.

7. The word "endorsement" used in an indictment for forgery, construed to be used in its popular sense. *Powell's case*, 11 Grat. 822.

8. In construing a provision of a will, the whole instrument is to be looked to to ascertain the intention of the testator. *Cheshire v. Purcell*, 11 Grat. 771,

See "WILLS," "CONTRACTS," "CONVEYANCES."

---

### CONTEMPT.

1. Commissioners proceeding to execute a decree after an appeal to the Court of Appeals has been taken and the process has been served upon them, are guilty of a contempt of the Appellate Court; and their acts are null and void, as to the rights of the parties to the appeal. *McLaughlin v. Janney et als*, 6 Grat. 609.

\* See Code of Virginia, chap. 16, §§ 17-19, p. 100.

## CONTINUANCE.

1. On a motion for a continuance of a cause on account of the absence of witnesses, the facts which it is expected to prove by them are stated. If it does not appear that the proof of these facts might be material on the trial, the continuance should be refused. *Nash v. Upper Appomattox Co.*, 5 Grat. 332.

2. On the trial of a criminal cause, the prisoner swore to the materiality of a witness, and asked for a continuance on the ground of his absence. The witness was the brother of the prisoner, and had not been examined before the committing magistrate or at the examining Court, and had left the city the day before the case was called. The prisoner admitted that he had other witnesses to prove the same facts he expected to prove by his brother. Held: No ground for continuance. *Mull's Case*, 8 Grat. 695.

3. The Court being satisfied from the evidence that a witness is absent with the connivance of the prisoner, such absence is no ground for a continuance of the trial on the prisoner's motion. *Wormeley's Case*, 10 Grat. 658.

---

CONTRACT.

1. It is incident to a contract for the sale of land by the acre, that the purchaser shall be allowed for a deficiency in the quantity of land in the tract purchased. *Neal v. Logan*, 1 Grat. 14.

2. Endorsements upon negotiable paper, made for the accommodation of the drawer impart not a joint, but a several and successive liability; each endorser being responsible to all who succeed him. *Bank of U. S. v. Beirne et als.*, 1 Grat. 234.

3. A vendee is put into possession of land purchased by him. He is bound to pay interest on the balance of the purchase money due upon the land at the time he took possession of it; though by the contract, the vendor binds himself to make said vendee a good and lawful title to the land before he calls upon him for the unpaid purchase money or though the vendee's contract is to pay the balance of purchase money, when a good title to the property is made to him. *Oliver's Ex'or. v. Hallam's Adm'r.*, 1 Grat. 298.

4. There is no warranty of *value*, on the sale, or exchange or the paying away of genuine banks notes; though it seems that there is a warranty of the *genuineness* of a note sold or paid away. *Edmunds v. Digges*, 1 Grat. 359.

5. The general rule, as to all executory contracts, is the value of the article at the time it should have been delivered, with interest from that time. *Enders v. Board of Public Works*, 1 Grat. 364.

6. An action may be maintained on a parol contract for the sale of a slave, although there is a bill of sale under seal, stating only a part of the parol contract. *Brent v. Richards*, 2 Grat. 539.

7. The promise of an obligor in a bond, to the assignee after an assignment, and without any consideration is not obligatory. *Bank of Washington v. Arthur et als.*, 3 Grat. 173.

8. Two persons unite to purchase a tract of land, for which they give \$3,000. They enter into a written contract under seal, by which one of them is to pay \$1,000 of the purchase money, and the land is to be equally divided between them. Each is to have a moiety of the land. *Stubblefield v. Beazeley*, 5 Grat. 51.

9. *Quære*: If parol evidence is admissable to explain what is meant by the equal division provided for in the contract. *Ibid.*

10. On a contract for the hire of a slave, fraud can not be inferred from the unfitness or unsuitableness of the slave for the purpose for which he was hired, and a knowledge of such unfitness by the owner. *Howell, &c., v. Cowles*, 6 Grat. 393.

11. A party to a compromise entered into in ignorance of important facts connected therewith, will not be held bound by it. *Ross Ex'or. v. McLaughlan's Adm'r. et als.*, 7 Grat. 86.

12. When a contract is made for the purchase of an article, thereafter to be delivered and paid for, so long as any act remains to be done by the vendor, in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but remains at the risk of the seller. *Dixon v. Myers & Co.*, 7 Grat. 240.

13. In written proposals for the sale of stock in a mining company, if the representations embraced therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded on such representations is void, whether or not, the vendors knew the representations to be false at the time they were made; and whether or not made with a fraudulent intent. *Crump v. United States Mining Co.*, 7 Grat. 352.

14. In such case the suppression from the written proposals of any fact within the knowledge of the vendors, materially affecting the value of the thing sold and inconsistent with the statements in the written proposals, violates the contract as fully as the false affirmation of any material facts, if the purchaser is injured thereby. *Ibid.*

15. If the representations made by the vendors were true and they sup-



pressed no material facts, the subsequent failure of the mine, in value and productiveness does not impair the right of the vendors to enforce the contract. *Ibid.*

16. A contract is made with a County Court for building a Courthouse, and, by the terms of the contract, the contractor is to give security for its performance. Owing to his insolvency, he is unable to give the security, but with the consent of the County Court, entered of record, he assigns the contract to his son, who gives the security. The son sells the contract for \$1,000. Held: The father at no time had such an interest in the contract as could be subjected to the satisfaction of his creditors. *Carroll et als v. Tiffany*, 9 Grat. 269.

17. An endorsement on a marriage contract of the same date with the contract and made by the parties thereto, is to be considered a part of the contract. *Eidson v. Fontaine Adm'r., &c., et als.*, 9 Grat. 286.

18. *Monomania* in no wise connected with the subject of a contract does not invalidate it. *Boyce's Adm'r. et als. v. Smith*, 9 Grat. 704.

19. A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in a subscription paper, those terms are themselves conditions, which must be complied with before the subscription is binding. *Galt's Ex'or. et als. v. Swain*, 9 Grat. 633.

20. To make a subscription binding as a contract, it must be acceded to, and the party must be apprised that his offer is accepted; and this must be done in a reasonable time. *Ibid.*

21. A subscription, like any other contract, requires a consideration to support it, either of profit to the party making it or of loss to the other party. *Ibid.*

22. To entitle a party to recover back money which has been paid upon a contract, which is wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction. *Johnson's Ex'ix. v. Jennings Adm'r.*, 10 Grat. 1.

23. If parties in making a contract, use words of definite legal signification, they must be understood as using such words, in their definite legal sense. *Findley's Ex'ors. v. Findley*, 11 Grat. 434.

24. By an agreement in contemplation of marriage, the intended husband binds his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar and in full compensation for her dower. This agreement bars her of dower in her husband's real estate, but does not deprive her of her distributable share of his personal estate. *Ibid.*

25. Where the contract for the sale of land is entire for a specific sum of

money, and the title to part of the land fails from a cause, of which both vendor and *vendee* were ignorant, it is ground for the rescission of the whole contract; but the purchaser cannot insist upon a partial rescission. *Bailey v. James*. 11 Grat. 468.

26. In such a case, if the purchaser declines to rescind the whole contract, he must pay the whole purchase money. *Ibid*.

27. Upon a bond to pay the purchase money of land, with a provision that upon the purchaser's failure to get the legal title from a third party, the contract of sale shall be void, the purchaser having been let into possession and continuing to hold, and himself neglecting to get in the legal title, he shall pay interest. *Ibid*.

28. The vendor having but an equitable title, and only selling his interest in the property without warranty and authorizing the purchaser to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance from him.

29. Where there is a joint purchase of land by two, to whom it is conveyed and who give their bond for the purchase money; in the absence of proof of any agreement to the contrary, they are entitled to the land in equal portions. *Jarrett v. Johnson*, 11 Grat. 327.

30. One of the purchasers having previously made a provisional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed, this other should have a specified part of the land, but the contract was not completed. This agreement between the purchasers was then at an end and cannot affect their rights under their joint purchase. *Ibid*.

31. Wherever the party originally bound by a contract continues bound to pay, the promise of a third party to pay is a collateral promise; and is not binding unless in writing. *May's Ex'ix. v. Humphreys*, 11 Grat. 636.

32. Where the promise to pay is for the whole work done, as well that done before as that done after the promise, even if the promise would have been valid as to the work to be done, yet being collateral as to that which had been executed, and being an entire promise, it is void as to the whole, unless it is in writing. *Ibid*.

33. A contractor for the construction of a bridge on a railroad, having received the monthly estimates, based on a particular construction of his contract, without objection, will be held to have acquiesced in that construction of the contract and to be bound by it. *Kidwell v. Covington and Ohio Rail Road Co.*, 11 Grat. 676.

34. The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract; that is a valid contract, and the

estimate of the engineer, in the absence of fraud or mistake, is conclusive. *Ibid.*

35. If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted his charges for the work done, to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer. *Ibid.*

36. The engineer having the right, under the contract to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount, and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders. *Ibid.*

SEE COVENANTS.

---

### CONTRIBUTION\*

1. One surety of an insolvent principal is entitled to contribution from his co-sureties, and if all the sureties are solvent, each is bound for his equal share. *T. L. Preston v. J Preston et als.*, 4 Grat. 88.

2. There being a judgment and execution against one surety, who gives a forthcoming bond with another joint surety against whom there was no judgment, which forthcoming bond is forfeited and the surety in the latter pays the debt, he is entitled to contribution from the sureties in the original bond. *Ibid.*

3. If one of the sureties is insolvent, his share is to be apportioned among the solvent sureties; but the surety in the forthcoming bond, having released the property of the principal in that bond, and that principal having become insolvent, the surety in the forthcoming bond is not entitled to recover from his co-sureties in the original bond, any part of the share of his said principal as one of the sureties in the original bond. *Ibid.*

4. The surety in the forthcoming bond is not entitled to a decree for the costs of awarding execution on said bond, either against the principal or sureties in the original bond, but only against his principal in the forthcoming bond. *Ibid.*

5. The right of one surety to call upon his co-surety for contribution, arises from a principle of equity, growing out of the relation which the parties have assumed towards each other: the equity springs up at the time of entering into that relation, and is fully consummated when the surety is compelled to pay the debt. *Wayland v. Tucker et als.*, 4 Grat. 267.

\* See Code of Virginia, chap. 122. §§ 17-18, p. 518. *Id.* ch. 187. § 10.

6. The principal and two or three sureties in a bond become insolvent; a solvent surety pays the debt. Previous to this payment, the solvent surety had executed his bond for less than half the first bond, to one of his co-sureties, who had conveyed it in trust for his creditors. After the payment of the first mentioned debt by the solvent surety, judgment was recovered against him on his own bond, and he then enjoined the judgment, claiming to offset it by his co-sureties' portion of the debt, he had paid. Held: 1st. That he is entitled in preference to the assignee of his bond. 2d. He is entitled to relief in equity, notwithstanding the judgment at law. *Ibid.*

7. The jurisdiction now assumed by Courts of law, to enforce contribution in some cases, does not affect the jurisdiction originally belonging to a Court of Equity. *Ibid.*

8. A tract of land is subject to a mortgage, and the owner of the land sells a part thereof and conveys it with general warranty; he then sells the remainder of the tract: The part last sold, is primarily liable for the mortgaged debt, and the owner thereof is not entitled to contribution from the first purchaser. *Henkle's Ex'or. &c. v. Allstaddt &c.*, 4 Grat. 284.

---

## CONVERSION.

1. Husband and wife convey the equity of redemption in the wife's land to a trustee to sell the same for the use and benefit of the grantors. This is a conversion of the land into personalty. *Siter, Price & Co. v. M'Clanachan et als.*, 2 Grat. 280.

2. Land is given to husband for life, but with power to elect within three years to have the land sold, and take a certain sum of money in lieu of the life estate in the land, absolutely. If he elects within three years, the election is an equitable conversion of the land into money, which will not be defeated by his death before a sale. *Washington's Ex'or v. Abraham et als.*, 6 Grat. 66.

3. A sale by an administrator of his intestate's effects, though upon a credit, must be treated at law as a conversion thereof. *Clarke v. Wells' Adm'r*, 6 Grat. 475.

4. But when upon a settlement of the administration of the administrator, between proper parties, it appears that the collection of such sale bonds by his personal representative, is unnecessary for the re-imbursement or indemnity of his decedent's estate, they will be turned over to the administrator *de bonis non*, as unadministered assets. *Ibid.*

---

## CONVEYANCES.

See DEEDS.

## CONVICT.

On the trial of a convict from the penitentiary for felony, a convict confined there for felony is a competent witness for the prosecution. *Johnson's case*, 2 Grat. 581.

---

## CORONERS.

*Quere*: If a coroner has authority to commit to jail, for trial, a person charged by the inquest taken before him, with a felony. *Wormeley's case*, 10 Grat. 658.

---

## CORPORATIONS.

1. A bequest to a corporation, of its own stock, is valid.. *Rivanna Nav. Co. v. Dawsons'*, 3 Grat. 19.

2. The officers of a private corporation have no franchise in their offices; but are the mere ministerial agents of the corporation, to conduct its business for the benefit and under the authority of the corporation. *Burr's Ex'or et als. v. McDonald et als.*, 3 Grat. 215.

3. The officers of a private corporation may be appointed or removed by the stockholders at any general meeting, whenever the welfare of the corporation requires it. *Ibid*.

4. Though the election of an officer of a private corporation has been irregular, such an election constitutes him an officer *de facto*; and his acts done under the authority of the corporation and *colore officii* will be binding on the corporation, and can not be impeached by strangers on the ground of want of authority. *Ibid*.

5. It is competent for a private corporation to execute a deed by an agent empowered to act, by a resolution of the stockholders in general meeting. *Ibid*.

6. A private corporation for manufacturing purposes may borrow money to carry on its operations. *Ibid*.

7. A deed, by a private corporation chartered prior to the act Feb. 13, 1837, in trust to pay its debts, which gives preferences in favor of some of the stockholders for their suretyships for the corporation, is legal and valid. *Ibid*.

8. The President and Directors of the Northwestern Turnpike road, under the act 1830-1, p. 153, are a corporation, liable to be sued for work and labor performed and materials furnished for them.\* *Dunnington v. Pres. and Dir. N. W. Turnpike Road*, 6 Grat. 160.

\* See Supp. Rev. Code, ch. 104, p. 153.

9. This case distinguished from the case of *Sagre* against the same corporation in 10 Leigh, 454. *Ibid.*

10. In an action by a corporation, the question, whether the corporation has forfeited its charter or not, is not open for enquiry, unless the forfeiture has been ascertained by the sentence of a court in a proper proceeding for the purpose. *Crump v. United States Mining Co.*, 7 Grat. 352.

11. The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers. *Ibid.*

12. The stockholders of a corporation having directed the directors to create new stock and sell it, and the directors having, instead of doing this, acquired original stock and sold it, their act may be subsequently ratified by the stockholders, so as to render the sales valid against the purchasers. *Ibid.*

13. The president of a corporation is not *ex officio*, the agent of the corporation to sell property which it may direct to be sold; and unless appointed the agent to sell, his representations will not affect the corporation. *Ibid.*

14. A debt is due to a partnership and the partners are afterwards incorporated, and the debt then becomes the debt of the corporation. It is competent to sue for it in the corporate name, in a Court of Equity. *Griffin's Ex'or et als. v. A. Macauley's Adm'r*, 7 Grat. 476. *Dismal Swamp Co. v. A. Macauley's Adm'r et als.* *Id.*

15. A plaintiff in equity claims to be a corporation. The defendant in his answer denies that the corporation has been regularly organized and calls for proof. The plaintiff failing to prove the legal organization of the company, the bill should be dismissed. *Bowyer's Adm'r et als. v. The Giles, Fayette and Kanawha Turnpike Co.*, 9 Grat. 109.

16. The act Feb. 5, 1817, incorporating the Northwestern Bank of Virginia, is a public act, of which the courts will judicially take notice, and in an action by the bank, it is not required to prove its incorporation. *Hays v. Northwestern Bank of Virginia*, 9 Grat. 127.

---

## COSTS.

1. In a prosecution for a misdemeanor, at the instance of a volunteer prosecutor, though the prosecution fails upon the ground that one of the grand jury was not duly qualified, there should be a judgment for costs against the prosecutor. *St. Clair's case*, 1 Grat. 556.

2. Judgment is obtained against the principal and some of the sureties of a bond, execution issues against one of the sureties and levied upon his

property; he gives a forthcoming bond with one of the sureties in the original bond as his surety; the forthcoming bond is forfeited and the last named security pays the debt. He is not entitled to a decree for the costs of awarding execution on said bond, either against the principal or sureties in the original bond, but only against his principal in the forthcoming bond. *T. L. Preston v. J. Preston et als.*, 4 Grat. 88.

3. A general judgment against two defendants in ejectment is proper, though one of them did not enter himself a defendant until there had been one trial of the cause and a large portion of the costs had been incurred. *Middleton v. Johns et als.*, 4 Grat. 129.

4. Plaintiff and defendant both setting up claims greater than they can establish and sustain, though each succeeds in part, may each be decreed to pay his own costs. *Beverley v. Brooke et als.*, 4 Grat. 187.

5. A trustee defendant, resisting plaintiffs claim, and failing in his defence, is liable for the costs. *Ibid.*

6. Upon opening a road, the costs of the inquest should be paid out of the county levy, but the other costs of the applicant should be recovered from the contestant. *White v. Coleman*, 6 Grat. 138.

7. So much of the judgment of the court below as affects the appellant being affirmed, although the Appellate Court reverses so much thereof as affects a third party who did not appeal, costs will be given to the appellee as the party substantially prevailing. *Harman v. Odell*, 6 Grat. 207.

8. A trustee appeals from a decree construing the trust, and the decree is affirmed. He must pay the costs out of his own estate. *Brown v. George*, 6 Grat. 424.

9. In a suit against an administrator for distribution, though the plaintiff has a decree, yet if the administrator has been in no default, he shall have his costs. *Eidson v. Fontaine, Adm'r &c., et als.*, 9 Grat. 286.

10. In a suit to enjoin the collection of purchase money on account of incumbrances and defect of title, though the incumbrance is removed and the title made good, so that the injunction is dissolved, yet plaintiff is entitled to his costs. *Young's Adm'r and Bowyer v. McClung et als.*, 9 Grat. 336.

11. But if there was another suit pending in which the plaintiff in the injunction suit might have had the relief he sought, by petition or supplemental bill, he shall not have his costs. *Ibid.*

12. A creditor, who with the knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs. *Stevenson v. Taverners*. 9 Grat. 398.

13. A plaintiff in equity whose house, in which his family resides, is fifteen feet on the Virginia side of the State line, and who, so far as known, lives with his family, is *prima facie* a resident of Virginia; and this *prima facie* case is not altered by proof that the sheriff had twice gone to the house with process against him, without finding him, and was told by the neighbors, that the plaintiff would not be seen by him: and he can not therefore be held to give security for costs. *Evans v. Bradshaw et als.*, 10 Grat. 207.

14. A pardon of a person convicted of felony does not release him from the costs of prosecution, for which an execution had been issued before the pardon was granted. *Anglea, &c. v. Commonwealth*, 10 Grat. 696.

15. The act, Code of Va., p. 783, § 11, only subjects the prisoner to such costs as the Commonwealth is bound to pay; and therefore does not embrace the fees of the clerk, sheriff, or attorneys of the Commonwealth. *Ibid.*

16. It was not improper before the act, Code of Va., p. 706, § 9, to render a judgment for costs in favor of a defendant against the person for whose benefit the suit was brought, when the defendant succeeded in the case. *Pates v. St. Clair*, 11 Grat. 22.

---

## COUNTY COURTS.

See COURTS.

---

## COUNTY LEVY.

1. An act requiring the County Court to lay a levy upon the titheables of the county for the purpose of improving the navigation of a stream lying within it, though passed without the assent of the people of the county, is constitutional. *Harrison justices v. Holland*, 3 Grat. 247.

2. A County Court having laid the county levy, and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's books and proceeded to collect the levy, as far as it could be collected, and returned a list of insolvents; upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendants to object that the County Court was not legally constituted, so as to be authorized to lay the levy when it was done, nor can they object that the commissioner's books were irregularly made out and not properly authenticated. *Cook, sheriff et als. v. Hays*, 9 Grat. 142.

3. The amount collected by the sheriff not being sufficient to pay all the



claims directed to be paid out of it, in the absence of proof that the sheriff has paid claims other than that of the plaintiff, the law will not presume he has paid them. *Ibid.*

4. In such a case, a demand upon the sheriff is necessary to sustain a motion against him and his sureties. But no objection for want of a demand having been in the court below, and the notice averring the demand, and the judgment giving a credit for a part of the debt, as paid on the day it was demandable, this is sufficient proof of the demand in the appellate court. *Ibid.*

---

COURTS.

1. The judge of a Circuit Superior Court may continue the session of the court until the latest period, which will allow him time to get to the next court by 4 o'clock, P. M., of the third day of the term.\* *Hill's case*, 2 Grat. 594.

2. A County Court professing to proceed under the act of 1819, in opening a road, it is not necessary that the record of their proceedings should shew that the County Court had previously dispensed with the act of 1835, in relation to roads, and retained the act of 1819. *White v. Coleman*, 6 Grat. 138.

3. The County Court has authority to require a party to enter into a recognizance to keep the peace: at least when the proceeding was commenced before the act; Sess. Acts, 1848, ch. 14. *Welting's case*, 6 Grat. 670.

4. An examining court has no right to sign a bill of exceptions to any opinion or act of the court; and if they do, it is no part of the record of the trial. *Souther's case*, 7 Grat. 673:

5. The Circuit Court is a court of general jurisdiction in all actions at law, between individuals, and its judgment in such case is conclusive of its jurisdiction, and cannot be questioned but by appeal. *Cox et als. v. Thomas' Adm'r*, 9 Grat. 323.

6. Unless it appears clearly upon the face of a record that the Circuit Court had not jurisdiction, the Appellate Court will presume the proceedings were such as to give it jurisdiction. *Ibid.*

7. A County Court having laid the county levy and directed the sheriff to pay certain claims of the county out of it, and the sheriff having received the commissioner's books and proceeded to collect the levy as far as it could be collected, and returned a list of insolvents, upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the

county levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendants to object that the County Court was not legally constituted so as to be authorized to lay the levy, when it was done; nor can they object that the commissioner's book was irregularly made out and not properly authenticated. *Cook, sheriff et als. v. Hays*, 9 Grat. 142.

8. The act, Sess. Acts 1851-2, ch. 66, § 23, p. 58, which directs that the Circuit Court of Henrico county shall be held at the State court-house in the city of Richmond, is not a violation of the 7th section of the 6th article of the Constitution of Virginia. *Scott's case*, 10 Grat. 749.

9. If a case of unlawful detainer has been pending in the County Court for more than twelve months without a final decision, it may be removed on motion to the Circuit Court. *Harrison v. Middleton*, 11 Grat. 527. *Kincheloe v. Tracewells*, *Id.* 587.

10. All civil causes, of which the Circuit Court has either original or appellate jurisdiction, may be removed from the County to the Circuit Court, upon motion, after they have been pending in the County Court for one year. *Ibid.*

11. The year is to be counted from the date of the organization of the court summoned to try the case. *Ibid.*

12. An unlawful detainer case removed to the Circuit Court is properly placed on the docket at the head of the civil causes in the court. *Ibid.*

13. The act, Code of Va., ch. 96, § 3, p. 443, vests in the county courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they can not be controlled by the circuit courts, either by *mandamus*, writ of error or *certiorari*. *Yeager, ex parte*, 11 Grat. 655.

14. Though the applicant for a license to keep a tavern may bring himself fully within and up to all the statute requires, so that the County Court may properly grant him the license, if they think fit, yet he does not acquire any such right to a license, as that the County Court may be required to grant it. *Ibid.*

15. It seems that the County Court is bound to act upon every application for a license, which is made to it; and if it refuses to act, the Circuit Court will coerce it by *mandamus*: but when the County Court does act, its judgment and discretion are not to be controlled. *Ibid.*

See APPEALS.

---

## COVENANTS.

1. Covenants, though independent in form, will be construed as mutual

and independent, when it is necessary to effect justice between the parties thereto. *Todds v. Summers*, 2 Grat. 167.

2. A party having covenanted to do two things, one of which he has done, will be allowed an action for the part done, as upon an independent covenant. *Ibid.*

3. If the failure of a party suing on a covenant to perform any of the acts which he had covenanted to perform, has been injurious to the other party to the covenant, he may set up this injury as a defence *pro tanto* to the action. *Ibid.*

4. Two persons unite to purchase a tract of land, for which they give \$3,000; and they enter into a contract under seal, by which one of the parties is to pay \$2,000, and the other \$1,000, of the purchase money, and by the contract the land is to be equally divided between them. Held: Each is to have a moiety of the land. *Quære*, If parol evidence is admissible to explain what is meant by the equal division provided for in the contract. *Stubblefield v. Beazely*, 5 Grat. 51.

5. Covenant between T. and W.; T. agrees to transport for W. from 1200 to 5000 bushels of salt annually, for three years from date, if the state of the waters of the Holston and Tennessee rivers permitted; insuring the safe delivery of the same to W. or his consignees, on the top of the bank of the Tennessee river, at any point that W. might direct, W. agreeing to pay to T. \$25 per ton. T. reserves the privilege of delivering at Marathon one-third of the salt, and for each part delivered at Marathon the charge is to be twenty-two dollars per ton. For all salt received and not delivered as above, T. is to allow W. one dollar and twenty-five cents per bushel, (and forty-six cents for each barrel;) except that for all salt lost by staving or sinking the boats used, T. is to be charged only fifty cents per bushel, and forty-six cents for each barrel. Held: 1. That the agreement of T. to transport salt, and of W. to pay him therefor, imports an implied covenant by W. to allow T. to transport and to furnish him with the agreed quantities for the purpose. 2. If the condition of the navigation was such that the salt could not be transported, T. was absolved from the obligation to transport it, and W. from the obligation to deliver it. 3. The agreement is not for the transportation of an aggregate amount of salt, in the three years, but for the transportation of the amount specified in each year. 4. The election as to quantity, is with the manufacturer and not with the carrier; and the carrier is entitled to transport within the year all the salt delivered in that year, and if he fails to do so, his right in regard to the quantity to be transported the next year is not affected. 5. The carrier T. is bound to transport, within the year, all the salt he receives from the manufacturer; and if he fails so to do, he is still entitled to transport the 1200 barrels the next year, but he has no right to call upon the manufacturer for more than the 1200 barrels. 6. If the carrier *wilfully* fails to transport the salt received by him in the first or second year, he is bound to transport it in the second or third year, and he can not withhold it and

at the same time call upon the manufacturer to supply what he has already in his hands. 7. In asserting a breach of the contract by W., T. must confine himself to a single year or declare distributively for several years. 8. It is the business of the carrier to attend at the works of the manufacturer at such times as suit his convenience, to receive the salt from time to time, as he is ready. 9. In an action by the carrier on this covenant, he can only recover for breach of the covenant by the manufacturer, or for services rendered by himself in accordance with the covenant. *White's Adm'x v. Toncray*, 5 Grat. 179.

6. A covenant by two to deliver an assignment of a part of a certain bond by a day fixed, is complied with, by a delivery of the bond, with an assignment of said part thereof to one of the covenantors, before the day. *Withers v. Hestend*, 5 Grat. 456.

7. Salt works are rented for two-thirds of the salt made, and the lessees covenant to make at least 60,000 bushels of salt in each year. For the failure to make the salt, the proper action is for the damages occasioned thereby, and to the extent of the failure; and not for a specific rent of 40,000 bushels of salt. *Prestons v. McCall*, 7 Grat. 121.

8. During the first year, the lessees, with the assent of the lessors, assign their lease and the assignees covenant to assume and pay all the contracts, debts and liabilities of the lessees, relating to the salt-making business: and the next day the assignees take a new lease, paying a money rent. The taking a new lease operated as a surrender of the first and extinguished the liabilities of the assignees prospectively; and as assignees, they were not liable for prior breaches of contract by the assignors. *Ibid.*

9. The surrender of the first before the end of the year, prevented a breach of the covenant to manufacture 60,000 bushels in each year. *Ibid.*

10. Though the lessors were not parties to the assignment of the lease, yet as it was made with their assent, which by the terms of the lease was necessary, they have the right to enforce the contract of the assignees to pay the debts of the lessees so far as they are concerned. *Ibid.*

11. The maker of a note becomes the bail of the holder thereof, and they enter into a covenant, by which the maker is to hold the note until his liability as bail ceases, and then to return it. The note is not merged in the covenant so that an action could not be maintained upon it, and the statute of limitations did not run, from the time when the covenant was executed, until the liability of the maker of the note, as bail for the holder thereof, ceased. *Bowles' Ex'or v. Elmore's Adm'x*, 7 Grat. 385.

12. There is a devise to J. with a limitation over upon his dying without issue at his death, to his brother R. if R. should survive, or to his representatives. R. dies in the lifetime of J. J. sells and conveys the land to A.; and R., though he does not convey the land, is a party to the deed, and J. and R. covenant as follows: That the said J., for himself and his

heirs, and the said R., as contingent devisee under the will of C. J., (by whom the land was devised to J.,) do hereby covenant and agree with the said A. that they will warrant and defend the fee-simple to said land to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and do relinquish and fully confirm to said A. all the right they and their heirs now have or may hereafter have to said land, or any part thereof to him and his heirs, free from the claim of the said J. and R. and their heirs, and of all other persons in the whole world. Held: 1st. That this covenant of R. extends to the claim of his children to the land, though they claim, not as his heirs but as devisees under the will of C. J. 2nd. That the covenant of R. is a covenant running with the land, and a purchaser claiming under A. a part thereof, by a regular chain of conveyances, is entitled to the benefit of said covenant for his indemnity against the said claim of the heirs of R. *Dickinson v. Hoome's Adm'r et als.*, 8 Grat. 353.

13. In an action of covenant, for the failure to deliver to the plaintiff possession of a mill which he had rented of the defendant, the plaintiff not having sustained any special damage, he is only entitled to recover the difference between the rent he contracted to pay and a fair rent for the property, at the time when it should have been delivered. A conjectural estimate of the profits, which might have been made, is no legitimate basis on which to fix the damages. *Newbrough v. Walker*, 8 Grat. 16.

14. In a covenant for the sale of land, possession is to be delivered on a day certain. The last payment is to be made on another day certain subsequent; and on the completion of said payments, the vendor is to convey. The two last are dependant covenants, and in an action by the vendor, to recover the money, he must aver, either that he had executed or that he had tendered the deed. The averment that he was ready and willing to convey is insufficient. *Roach v. Dickinsons*, 9 Grat. 154.

---

## CREDITOR.

See DEBTOR AND CREDITOR.

---

## CRIMINAL JURISDICTION AND PROCEEDINGS.

See JURISDICTION.

---

## CURATRIX.

1. Curatrix having proceeded to administer upon her husband's estate; in the Appellate Court she will be presumed to have been appointed under

the 42nd section of the act 1 Rev. Code, ch. 104. *Cross' Ex'x v. Cross' Legatees*, 4 Grat. 257.

---

### CUSTOM.

1. A custom known and acquiesced in by the party affected by it, will excuse the non-performance of a duty prescribed by statute. *Governor for Liggatt v. Withers*, 5 Grat. 24.

2. To set up such a defence, it must be specially pleaded and can not be given in evidence under the plea of the general issue. *Ibid.*

3. It being necessary to plead a custom and acquiescence therein specially, as a defence to an action, and the proof thereof having been admitted under the general issue on the first trial without objection by the plaintiff, the defendant will be allowed to amend his pleadings on the return of the case from the Appellate Court, and plead the matter specially. *Ibid.*

---

### DAMAGES.

1. Parties pulling down a house in town, to arrest the spread of a fire, are responsible for damages thereby sustained by the owner, if the house may be prevented taking fire by the use of means within the power of the parties pulling it down. *Beach v. Trudgain et als*, 2 Grat. 219.

2. The Court of Appeals, upon affirming the decree of the court below, which does not bear interest, will give damages at the rate of *six per centum per annum*, upon the amount of the decree, exclusive of costs from the time the appeal took effect, until paid. *Mulliday v. Machir's Adm'r*, 4 Grat. 1.

3. A contract for the sale of a slave provides that the vender shall have the refusal of him, at the price which he received for him. The measure of damages for a failure of the vendee to comply with the contract, is the difference between that sum and the price for which the vendee sold the slave. *Brent v. Richards*, 2 Grat. 539.

4. The measure of damages upon the warranty of the soundness of an animal sold, is the difference between the value of the animal, sound as warranted and his value at the time of the sale, in the condition he really was. And the price at which the animal was sold is proper evidence of the value at that time, if sound to the extent of the warranty; and the rule is the same, whether the purchaser offers to return the animal or not. *Thornton v. Thompson et als.*, 4 Grat. 121.

5. In a joint action of trespass against several who plead jointly, if the

jury find them guilty jointly, they should assess the damages jointly against all. *Crawford v. Morris*, 5 Grat. 90.

6. If in such case, the jury assess by mistake, damages severally, the plaintiff may cure the defect by entering a *nolle prosequi* as to all but one and taking judgment against that one. *Ibid.*

7. In such a case, it is not correct for the court to instruct the jury that they may sever in the damages, and assess what, in their opinion, each party, found guilty, ought to pay. *Ibid.*

8. In such a case, the jury should assess against all who are found guilty, the amount which they think the most guilty should pay. *Ibid.*

9. In such case, therefore, an instruction to the jury that they may sever the damages, is not an error of which a defendant can complain in an Appellate Court, though the plaintiff may. *Ibid.*

10. An injunction is dissolved and on appeal the decree is affirmed. The *ten per cent. damages* is not to be computed for the time the case was pending in the Court of Appeals. *Jeter v. Langhorne*, 5 Grat. 193.

11. In an action of covenant for the failure to deliver to the plaintiff possession of a mill, which he had rented from the defendant, the plaintiff not having sustained any special damage, he is only entitled to recover damages for the difference between the rent contracted to be paid and a fair rent for the property when it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis, on which to fix the damages. *Newbrough v. Walker*, 8 Grat. 16.

12. A jury of inquest, in a mill case, are induced by the opinions expressed and facts stated by the father of the applicant, to report that no person will sustain damage from the dam allowed to be built, and the inquisition is confirmed by the court. This inquest and judgment is no bar to an action for damages, sustained by the father against a vendee of the mill, which were not actually foreseen and estimated by the inquest. *Calhoun v. Palmer*, 8 Grat. 88.

13. The conduct of the father does not defeat his right to recover damages for the injury he has sustained. *Ibid.*

14. Where a mill-owner does not raise his dam, at first, as high as he is authorized to do, that will not preclude him from raising it to the full height authorized by the inquest, provided he does not thereby occasion injury to others. *Ibid.*

15. The father having united in the conveyance of the mill to the vendee, he cannot recover damages for any injury done to him by the erection of the dam, to the extent the injury existed at the time of the conveyance. *Ibid.*

16. A bill of exchange having fallen due and been protested before the act allowing three *per cent* damages, and interest upon the cost of protest, went into operation, such damages and interest are not recoverable thereon. *Friend v. Wilkinson and Hunt*, 9 Grat. 31.

17. The measure of damages in an action upon a prison bounds bond, is the debt, interest and costs. *McGuire et als. v. Pierce, Assignee, &c.*, 9 Grat. 167.

18. A petition for an appeal having been presented to the court, before the 1st of July, 1850, though an appeal was not allowed until after that date, no damages are to be allowed upon affirming the appeal. *Price v. Kyle*, 9 Grat. 247.

19. Pending a bill for an injunction to a judgment, and for the rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and perfects the title. The injunction is properly dissolved, but without damages and with costs to the plaintiff. *Young's Adm'r and Bowyer v. McClung et als.*, 9 Grat. 336.

20. In the absence of evidence clearly showing that the damages assessed by a jury of inquest are insufficient, the inquest taken on the ground must be deemed conclusive on the question. *Muire v. Falconer et als.*, 10 Grat. 12.

21. A purchaser coming into a Court of Equity to injoin a judgment for the purchase money of land, though the title is afterwards perfected, is entitled to his costs. *Reeves v. Dickey*, 10 Grat. 138; *Jaynes et al. v. Brock*, *Id.* 211.

22. The damages on the dissolution of an injunction to a judgment, become, as to the party in whose favor they are, a part of the judgment, and are as such, a lien upon the land of that party. *Michaux's Adm'r v. Brown et als.*, 10 Grat. 612.

23. In actions by passengers against carriers for injuries sustained, the judgment of the jury, as to the amount of damages, must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Farish & Co. v. Reigle*, 11 Grat. 697.

---

## DEBT.

1. An action of debt on the official bond of a sheriff for the misconduct of his deputy in serving an execution, must be at the relation of the plaintiffs in the execution. *Governor for Leightons v. Hinchman et als.*, 1 Grat. 156.



2. An acknowledgement of indebtedness in a deed, by the grantor to the grantee, will sustain an action of debt. *Newby v. Forsyth*, 3 Grat. 308.

3. In declaring upon such an acknowledgment of indebtedness in a deed, it is not necessary to set out more of the deed than that which contains the acknowledgment, and this according to its legal effect. *Ibid.*

4. An instrument, binding the parties thereto to pay a sum of money, purports to be under their hands and seals, but it is signed by one of the parties without a seal, and by the other parties with seals to their names. One action of debt may be brought against all the parties. *Rankin v. Roler et als.* 8 Grat. 63.

5. In an action of debt, under the plea of payment without a bill of particulars, the defendant may give in evidence the parol admissions of the plaintiff, that but a certain part of the debt is due. *Rice's ex'or v. Annat's adm'r.* 8 Grat. 557.

## DEBTOR AND CREDITOR.

1. Although a creditor having remedies against several persons, each equally responsible to him, may proceed to enforce payment of his debt from either and is not bound to proceed against all, yet he waives this right, by convening all before the Court, and asking that the persons and subject, of right chargeable with the debt, should pay it. *Bentley et als. v. Harris adm'r.*, 2 Grat. 357.

2. A general direction by a creditor to his debtor to remit money to him, without prescribing the mode of remittance, does not authorize the debtor to remit, by mail, at the risk of the creditor. The direction must be specific, both as to the mode and the subject of remittance, to make it at the risk of the creditor. *Gross, Myers and Moore v. Criss*, 3 Grat. 262.

3. A benefit which has been secured to a husband to be enjoyed, jointly with his wife and children, cannot be subjected by the creditors of the husband. *Perkins trustee v. Dickinson & Co.*, 3 Grat. 355. *Mundy v. Vawter et als. Idem*, 518.

4. A debt contracted in Virginia, between citizens of Virginia, is not barred in Virginia, by a discharge under the insolvent laws of Maryland, where he was sued, though the creditor appeared and opposed his debtor's discharge. *McCarty v. Gibson*, 5 Grat. 307.

5. A payment, made by a debtor to his creditor, cannot be applied by the creditor to a debt arising subsequently without the assent of the debtor. *Laws Ex'ors v. Sutherland et al.* 5 Grat. 357.

6. A creditor files a bill against the executor to subject land to the payment of his debt, to which suit the devisees are not parties; and there is a decree, and a sale, and conveyance which is confirmed. The devisees not being bound by the decree, recover the land. The creditor having entered into no covenants, and been guilty of no fraud, is not liable either to the purchaser, executor or devisees. *Hudgin v. Hudgin's ex'or et als.* 6 Grat. 320.

7. C. makes a contract with a County Court for building a Courthouse, and by the terms of the contract he is to give security for its performance. Owing to his insolvency he is not able to give the security but with the consent of the County Court, entered of record, he assigns the contract to his son, who gives the security; the persons becoming security for the son being unwilling to become sureties of C. The son then sells the contract for \$1000. Held: C. had at no time such an interest in the contract, as could be subjected to the satisfaction of his creditors. *Carroll et als v. Tiffany*,

8. A bill to marshall assets, or for their administration, should be on behalf of the plaintiff and all other creditors; and the heirs and devisees should be parties. But if the proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account has been made in another suit having the same object. *Stephenson v. Taverners*, 9 Grat. 398.

9. If several suits are pending by different creditors, the court will order the proceedings in all but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary. *Ibid.*

10. A creditor who, with a knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs. *Ibid.*

11. A decree in one creditor's suit for an account operates a suspension of all other pending suits of creditors; and they must come in under the decree. *Ibid.*

12. When several creditor's suits are pending, the decree may be made in the cause first ready for hearing, though that is not the first suit brought. *Ibid.*

13. A creditor at large may maintain a suit in equity to set aside a fraudulent deed conveying real estate, made by his debtor, both the debtor and his grantor living out of the Commonwealth. *Peay v. Morrisson's ex'ors.*, 10 Grat. 149.

14. Creditor qualifies as administrator on his debtor's estate, and after exhausting the personal assets in payment of debts, is still a creditor. In a suit by the heirs, in the County Court, the land is sold; and the administrator files a bill in the Circuit Court, to enjoin the payment of the purchase money to the heirs, and asks to have it applied to his debt. Held:

1st. He is entitled to have the proceeds of the land applied to pay his debt.

2d. The injunction should only go to restrain the payment of the purchase money to the heirs; and should not restrain the collection of it by the County Court.

3d. Though it would have been more regular for the administrator to connect himself by petition or bill, with the proceedings in the County

Court, in which the fund had been realized, yet there is no serious objection to the mode adopted by him. The County Court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as the Circuit Court may appoint to receive it; or one of the suits may be removed to the Court in which the other is pending.—*Williams v. Williams et als.* 11 Grat. 95.

15. A deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors; not having been duly recorded.—*Johnson and wife v. Stater et al.* 11 Grat. 321.

16. A settlement which gives to the grantor a bare maintenance with his wife for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts.

*Johnston v. Zane's trustees et als.* 11 Grat. 552.

17. Though a deed be executed without the knowledge of the creditors secured by it, yet, if when informed of its execution they assent to it, it is valid.—*Cochran v. Paris et als.* 11 Grat. 348. *Dance et als. v. Seaman et als.* *Idem* 778.

18. QUERE: If a subsequent creditor can file a bill to set aside a deed on the ground that it is voluntary, and therefore void as to prior creditors; no prior creditors complaining of it.—*Johnston v. Zane's trustees et als.* 11 Grat. 552.

---

## DECREES:

1. It is error to decree in favor of a person not a party to the cause in which the decree is made. *Bailey's adm'r v. Robinson's*, 1 Grat. 4.

2. The Statute 1 Rev. Code, chap. 104, § 63, p. 390, applies as well to creditors by decree, as those by judgment. *Bush v. Beale*, 1 Grat. 229.

3. A decree in a proceeding by foreign attachment, against an absent debtor, directs that the home defendant shall pay out of a particular fund, and that the plaintiff shall execute to the absent debtor, a bond with the condition prescribed by the statute, which is not done. The decree is no lien upon the real estate of the home defendant. *Enders v. The Board of Public Works*, 1 Grat. 364.

4. A decree in equity is a lien upon the equity of redemption of real estate, mortgaged for payment of debts. *Ibid.*

5. A party coming into court, four or five years after a conditional decree, to ask for an award of execution thereon, it is proper for the Court to direct

an account of subsequent transactions between the parties and decree accordingly. *Davis v. Crews*, 1 Grat. 407.

6. An award made in a cause pending in a Court of Equity, directs the plaintiff to pay to the defendant, a sum of money with interest, and that the defendant, within ninety days after the award shall be entered as the decree of the Court, shall convey to plaintiff's wife a good title to land in controversy; and if he fail to do so, he shall pay her \$1,500. The award is entered as the decree of the Court. This is a final decree; and defendant must make the conveyance within ninety days, or he will be bound to take the property and pay the money. *Ibid.*

7. A decree in a cause in which only the trustees are made parties defendant, will not bind the rights of the *cestui's que trust*. *Commonwealth v. Ricks*, 1 Grat. 416.

8. A decree against an executor will be enforced in a distinct suit against his sureties. *Hobson v. Yancey et als.*, 2 Grat. 73.

9. A decree against an absent debtor when he does not appear, only stands confirmed at the expiration of seven years, so far as it operates upon the estate of such absent debtor, subject to the jurisdiction of the Court. *Rootes' ex'r v. Tompkins' Trustees*, 3 Grat. 98.\*

10. A decree *in personam*, against an absent debtor is as conclusive as other decrees, in all collateral controversies; so that, if property is sold under execution issued thereon, the title to such property cannot be impeached by objections to the form or merits of the decree. *Ibid.*

11. Such a decree merges the original cause of action, so far as to enable the plaintiff to rely thereon, in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes, and to repel the statute of limitations, except so far as the statute applies to judgments or decrees. *Ibid.*

12. A decree *in personam* against an absent debtor is not necessarily conclusive after seven years. *Ibid.*

13. Decrees against absent defendants have the same effect as against absent debtors. And so far as the decree operates upon a subject within the jurisdiction of the Court, the interest of such absent defendant therein, is conclusively bound by the decree, unless he shall appear and petition for a rehearing within seven years. But the limitation of seven years, has no application to so much of said decree as operates *in personam* and establishes a personal demand. *Ibid.*

14. A Court of Equity can only decree upon the case made by the pleadings, though the evidence may show that the plaintiff is entitled to further relief. *Mundy v. Vawter et als.*, 3 Grat. 518.

\* See Code of Virginia, chap, 170, § 13.

15. When an interlocutory decree merely confirms, generally, a report containing alternate statements, the Court reserves to itself the power of selecting by its future decree, between such statements and decreeing accordingly. *McCandlish, adm'r, &c. v. Edloe et als*, 3 Grat. 330.

16. A decree which disposes of the whole subject in controversy and gives all the relief, contemplated, and leaves nothing to be done, is a final decree. *Van-Meters' ex'ors v. Van-Meters*, 3 Grat. 148.

17. A decree which settles all matters in dispute in a cause, but omits to decree upon a claim set up in the bill, but which after-circumstances had rendered unimportant and which the plaintiff did not insist upon, is a final decree. *Ruff v. Starke's adm'r*, 3 Grat. 134.

18. A decree of partition being a necessary link in a chain of title, if the decree sufficiently designates the land referred to in it, it is competent evidence, without the production of the whole record. *Wynn v. Harman's devisees*, 5 Grat. 157.

19. An objection that a decree has not been recorded in the County where the land lies, cannot be made for the first time in the Court of Appeals. *Ibid.*

20. A decree directing a conveyance of land by the Marshal, is not evidence, of itself, of the Marshal's authority to convey the land embraced in his deed, unless it designates the land directed to be conveyed; but the whole record, or so much as will show the land, intended by the decree, must be produced with it. *Master's v. Varner's ex'ors*, 5 Grat. 168.

21. A decree being affirmed by an equal division of opinion in the Court of Appeals, that settles the principles of the cause involved in the decree of the Court below. *Phillips et als. v. Williams, &c.*, 5 Grat. 259.

22. Upon an appeal from an interlocutory decree, the principles of the decree, and not mere informalities in the form thereof, are the proper subjects of consideration in the appellate Court. The decree will not therefore be reversed for such errors of form, but will be affirmed without prejudice to the appellant's right, to move the Court below for a modification of the decree in these respects. *Woodson's trustee v. Perkins*, 5 Grat. 345.

23. If a defendant is dead at the time a decree is made against him, and there is notice of his death upon the record, the decree cannot be impeached on that account, in a collateral action; but the error should be shewn in some proceeding by the proper parties, to set aside the decree for this cause. *Evans and wife v. Spurgin*, 6 Grat. 107.

24. In a suit by foreign attachment, the subpoena is served on the absent defendant and there is a decree against him for the debt. In another suit brought to enforce this decree, its validity cannot be questioned. *Burbridge v. Higgins' adm'r*, 6 Grat. 119.

25. A decree is a lien on the debtor's land; and the creditor may come into equity to subject the land, though the decree never has been revived against the administrator of the debtor, and no execution has issued upon it. *Ibid.*

26. A decree against an executor does not bind devisees. *Hudgin v. Hudgin's ex'or et als*, 6 Grat. 320.

27. A decree directing land to be sold unless a sum certain is paid by a day specified, the clerk has no authority to issue execution on the decree without an order of the Court or the Judge in vacation. *Shackleford v. Apperson*, 6 Grat. 451.

28. Though circumstances may exist which will warrant the Court or the Judge in vacation to allow process of execution on such an interlocutory decree, these circumstances must be shewn; and if not shewn, it is improper to allow it. *Ibid.*

29. If an execution is issued on such a decree by the clerk, without authority, the Court may quash the execution in term, or the Judge in vacation may restrain proceedings thereon, by an injunction order. *Ibid.*

30. A marriage agreement, though not recorded, having been affirmed by a decree after the marriage, and before the husband became indebted, is valid against the husband's creditors. *Dabney and wife et als., v. Kennedy*, 7 Grat. 317.

31. It was not necessary to record the decree to make it valid against creditors of the husband. *Ibid.*

32. A decree after the death of the husband, in a suit against his administrator, vesting the property in his wife and children, is conclusive against the administrator and creditors of the husband. *Ibid.*

33. In a bill by a creditor against an administrator and his sureties, charging a *devastavit* by the administrator and the liability of his sureties for it, though some of the sureties insist in their answer, that under the circumstances, one of the sureties is liable to the others, if they are liable to the plaintiff; though there is a decree for the plaintiff, and though it appear from the proofs that the *devastavit* was occasioned by the payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a case for a decree between co-defendants. *Allen & Ervine v. Morgan's adm'r et als.*, 8 Grat. 60.

34. A judgment creditor, concluded by a decree in a cause, in which he is a defendant, though he has, at the same time, a suit depending against the same parties to enforce his prior lien. *Jones, &c. v. Myrick's ex'ors*, 8 Grat. 179. *Myrick's ex'ors v. Epes et als*, *Id.*

35. A decree which passes upon the whole subject in issue, so as to be final in its nature, is not converted into an interlocutory decree, by the ad-

dition thereto of an order, suspending the decree as to the amount of one item of the account involved in the cause, until the decision of another suit, brought by another party against both plaintiffs and defendants in the first suit, in which the amount of this item is claimed by the plaintiff. *Fleming et als. v. Bolling et als.*, 8 Grat. 292.

36. Upon an appeal by one of two parties from a joint decree, the appellate Court will reverse the decree as to both. *Lenows v. Lenow*, 8 Grat. 349.

37. The court in its decree expresses an opinion in favor of the claim made by a defendant in his answer. This decree does not conclude the question, when it is afterwards set up by way of cross bill. *Niday v. Harvey & Co. et als.*, 9 Grat. 454.

38. It is error to make a joint decree in favor of several, when one is an infant, though made by consent of next friend. *Armstrong's heirs v. Walkup et als.*, 9 Grat. 372.

39. Decree corrected in appellate Court, on admission in bill, and affirmed. *Boyce's adm'r et als. v. Smith*, 9 Grat. 704.

40. Decree against two, as to one of whom bill taken for confessed; on appeal by latter, decree reversed as to both. *Purcell v. McCleary et al.*, 10 Grat. 246.

41. The decree in a proceeding for the sale of infant's lands under the value of \$300 is conclusive upon the infant. *Parker et als. v. McCoy et als.*, 10 Grat. 594.

42. Though the decree gives a day in Court to the infant, he can not disturb the sale against a *bona fide* purchaser. *Ibid.*

43. To what errors in the proceeding and decree consent extends. *Buchanan v. Clark et als.*, 10 Grat. 164.

44. A decree of a Court of Equity set aside for fraud, upon a bill against the heirs at law of the party procuring the decree. *Evans et als. v. Spurgin et als.*, 11 Grat. 615.

45. A decree against an absent defendant, obtained by fraud, is not protected after seven years, by the Act 1 Rev. Code, 1819, p. 475-6, § 4. *Ibid.*

46. If an absent defendant does not appear, there can not be a personal decree against him, but if he does, there may be both a personal decree and a decree subjecting the attached effects. And if an absent debtor appear and the attachment has not been sued out or levied, there may still be a personal decree against him. *O'Brien et als. v. Stephens et als.*, 11 Grat. 610.

## DEEDS.\*

1. A deed executed before judgments obtained against the grantor, the purchaser being in possession and the purchase money paid, is void against judgment creditors unless recorded before judgment, even when a *ca. sa.* having been levied upon the debtor, he had been discharged as insolvent. *McClure v. Thistle's ex'ors*, 2 Grat. 182.†

2. A deed of trust is recorded in the county in which the slaves, granted in it are. One of the slaves is removed without the trustee's consent. The deed is not void as to purchasers, though not recorded within twelve months, where the slave was removed. *Crouch et als. v. Dabney*, 2 Grat. 415.‡

3. In such a case it must be proved that the slave was removed with the assent of the trustee. *Ibid.*

4. An embarrassed debtor makes a voluntary conveyance to an unmarried woman. Upon her subsequent marriage, the property is settled to her use for life and after her death, to her children. It is not liable for the donor's debts. *Bentley et als. v. Ham's adm'r*, 2 Grat. 357.§

5. The acknowledgment of a deed before justices of the peace and their certificate is not conclusive evidence of the complete and perfect execution of the deed. *Hutchison and wife v. Rust et als.*, 2 Grat. 394.

6. The intention of the grantor, as to the execution may be evidenced by his declarations before or at the time of acknowledgment. *Ibid.*

7. An error as to the date of a deed in the certificate of acknowledgment will not avoid the registry, if its identity is ascertained. *Horsley et als. v. Garth et als.*, 2 Grat. 471.

8. A deed must be left with the clerk, in order to make it good as a recorded deed, and the endorsement of the clerk is not conclusive evidence of the date when it was left for record. *Ibid.*

9. The clerk of a county or corporation Court has no authority to record a deed, which does not convey land in his county or corporation. *Pollard's heirs v. Lively*, 2 Grat. 216.

10. A copy of a deed, recorded in a county where none of the land lies, is not evidence. *Ibid.*

11. A deed conveys several tracts of land in several counties, it is only good, as a recorded deed as to the land in the county where it is recorded. *Horsley et als. v. Garth et als.*, 2 Grat. 471.

\* See Code of Virginia, chap. 118, p. 507.

† See Code of Virginia, chap. 118, § 7, p. 509.

‡ See Code of Virginia, chap. 118, § 8, p. 509.

§ See Code of Virginia, chap. 118, § 2, *et. seq.* p. 508-9.



12. An embarrassed debtor, retaining enough to liquidate his debts, conveys the balance of his property to his wife and children. *Held*: the deed is fraudulent as to existing creditors. *Hunters v. Waite*, 3 Grat. 26.\*

13. A conveyance by an insolvent firm, of all debts due them held, under its provisions, only to pass balance, after offset of claim not yet due. *Fry & Co. v. Boyd, &c. et als.*, 3 Grat. 73.

14. A conveyance in fraud of creditors, being on a secret trust, partly executed, the trust will be enforced, the trustee not objecting. *Turner and wife v. Campbell et als.*, 3 Grat. 77.

15. A reservation in a deed of trust, inconsistent with the objects of the trust, and in defeat of the same, avoids the deed as to creditors postponed. *Sheppards v. Turpin*, 3 Grat. 373.

16. A conveyance on the consideration that the grantee shall pay all debts of the grantor, not signed by the grantee, but acted upon by him, binds him to pay such debts. *Van-Meters' ex'ors v. Van-Meters*, 3 Grat. 148.

17. A deed is executed by one professing to act under power of attorney; a sufficient time having elapsed, to bar a writ of right, without any claim by the original owner or his heirs, the presumption is that he was duly authorized. *Goodwin v. McCluer*, 3 Grat. 291.

18. A *feme* contemplating marriage, conveys her estate in trust with intent to secure it against the debts of her intended husband, who is notoriously insolvent. A Court of Equity will so construe the deed as to give effect to that intent; and if the deed fails to carry out that intent in its terms, the Court will leave the creditor to his remedy at law, if he has any. *Perkins' trustee v. Dickinson & Co.*, 3 Grat. 335.

19. A sheriff, authorized by law to sell, conveys land to a purchaser. The recitals in the deed shews his right to sell, after a long lapse of time the recitals are to be taken as true. *Robinett v. Preston's heirs*, 4 Grat. 141.

20. An instrument with a scroll attached to the grantor's name, though not recognized in the body of the instrument, held a deed when acknowledged as a deed in Court, to be recorded. *Ashwell v. Ayres et als.*, 4 Grat. 283.

21. A deed lost after acknowledgment and before recordation, cannot be set up against grantor's creditors, though the loss does not affect the equitable estate, acquired by the grantee's purchase, as between the grantor and grantee. *Withers v. Carter et als.*, 4 Grat. 407.

22. To authorize the admission of an old deed in evidence without proof of its execution, there must be proof of possession according to and under

\* See Code of Virginia, chap. 118, § 2, p. 503.

the deed, and proof of possession commencing fifteen years after the date of the deed and not until a conveyance by the grantee in the old deed, is insufficient. *Shanks et als. v. Lancaster*, 5 Grat. 110.

23. It is sufficient by an attorney in fact for his principal, if he signs the name of the principal, with the seal annexed, stating it to be done by him as attorney for the principal; or if he signs his own name, with a seal annexed, stating it to be for the principal. *Ibid.*

24. A deed of a husband and wife, executed under a power of attorney is good as to the husband, but void as to the wife. *Ibid.*

25. A party claiming title under a deed from a Collector of the U. S. for land sold for direct tax, must shew that every thing had been done which the law required, before making sale. The deed is not *prima facie* evidence as to that. *Jesse v. Preston*, 5 Grat. 120. *Keith v. Preston*, *Id.*

26. Neither a parol agreement before nor after the execution of a deed, conveying land by will defined boundaries, can have the effect of embracing, in the deed, adjacent lands. *Pasley v. English et als.*, 5 Grat. 141.

27. A deed was acknowledged before a clerk out of his office, he endorsed on it, that it was on that day exhibited in his office, acknowledged by the parties thereto and admitted to record and then took the deed to his office and deposited it there. The deed was valid as a recorded deed, from the date of the certificate. *Carper et als. v. McDowell*, 5 Grat. 212.

28. A certificate of the clerk that a deed was acknowledged in Court by husband and wife, and ordered to be recorded, is not sufficient to make it her deed. *Healey et als. v. Rowan et als.*, 5 Grat. 414.

29. The owner of land having conveyed it by deed duly executed and delivered, a second deed from him to the same grantee is wholly inoperative. *Evans and wife v. Spurgin*, 6 Grat. 107.

30. A deed executed by a woman a few days before her marriage to secure a debt to her daughter by a former marriage, held to be valid. *Fletcher and wife v. Ashley et als.*, 6 Grat. 332.

31. A deed of trust held to be fraudulent, though executed to indemnify a *bona fide* security. *Spence v. Bagwell et als.*, 6 Grat. 444.

32. A husband conveys an interest in personal property, though not to take effect until his death. Although he reserves the power to sell and reinvest on account, and also the power to reappoint among specified objects, the deed is valid to bar the wife of her distributable share therein. *Gentry et als. v. Bailey*, 6 Grat. 594.

33. A father, wealthy and unembarrassed, executes to his daughter, to be paid upon her marriage, a bond. She marries, and after her marriage, her father being embarrassed to insolvency, executes a deed conveying property

to secure the payment of this bond. The deed is valid against creditors of the father. *Wells v. Cole et als.*, 6 Grat. 645.

34. A deed is properly admitted to record, upon the certificate of acknowledgment, describing the officers who made, it as aldermen of New York. *Ibid.*

35. The sheriff, representing the creditors of an insolvent debtor, may sue to set aside a fraudulent conveyance of the insolvent. *Clough, &c. v. Thompson*, 7 Grat. 26.

36. A grantor remaining in possession of personal property he has conveyed. It is *prima facie* evidence of fraud. *Curd v. Millar's ex'ors*, 7 Grat. 185.

37. W. largely indebted, gave slaves to his daughter, whose husband retained possession of them for eight years. Judgments were obtained against W. for debts due both before and after the gift, and B. became security for W. on the forthcoming bonds, had to pay the money. Upon his obtaining judgment as security against W. the slaves and their increase were held liable to the execution of B.

38. Under the words in a deed, "all debts due to the grantor," the indebtedness of a partner of the grantor to the partnership and a claim which the grantor has against a foreign government for damages for the detention of his ship will pass. *Griffin's ex'or et als. v. A. Macauley's adm'r*, 7 Grat. 476. *Dismal Swamp Fund Co. v. Same*, *Id.*

39. Deed of trust held to be valid against creditors, securing a loan of money not to be enforced for ten years; conveying without schedule, household furniture, &c., to secure a debt, but not to be enforced for eighteen months; also conveying land to secure a debt, but not to be enforced for two years and then only upon notice of sale for 120 days, although the execution of the deed is postponed for five years from the date of the conveyance, and the rents and profits of the property in the meanwhile are reserved to the grantor. *Lewis et als. v. Caperton's ex'or et als.*, 8 Grat. 148.

40. A deed conveying the future rents and profits of property conveyed in other deeds, and which were reserved to the grantor in the previous deeds, is valid against creditors of the grantor. *Ibid.*

41. A post nuptial settlement made by a husband on his wife, of her personal property, derived from her father's estate, but of which he retains the possession, not having been properly recorded, is void against creditors of the husband. *Ibid.*

42. A deed made by a husband in embarrassed circumstances, by which he conveys the proceeds of his wife's land, which had been sold, and the note, for the purchase money, made to him, in trust for himself and his wife for their lives and the life of the survivor, and during his life to be under his management and control, is fraudulent and void as to creditors. *Ibid.*

43. A deed conveying land to secure a *bona fide* debt due to the grantee and also a debt to the grantor's wife, which latter debt is voluntary and fraudulent as to his creditors; and the nature of which debt is known to the grantee, is null and void as a security for the first as well as the last mentioned debt, as against subsequent incumbrancers and creditors of the grantor. (By two Judges.) *Ibid.*

44. A deed from a commissioner under a decree, offered in evidence, must be fortified by so much of the record of the cause as will shew his authority. *Coles v. Miller et als.* 8 Grat. 6.

45. A deed by a commissioner under a decree, directing a conveyance of land to which none of the parties to the suit had title or possession, conveys nothing. *Ibid.*

46. A deed, which shows upon its face that the parties to it resided out of Virginia, was properly admitted to record upon the certificate of acknowledgment, by the Mayor of a city in another State, describing himself, as such and purporting to be under the seal of the City. *Ibid.*

47. The certificate is sufficient evidence that the grantor resided for the time being in the State, though the deed describes him as a citizen of another State. *Ibid.*

48. It seems that a residence however brief is sufficient to authorize the acknowledgment of a deed there by a non-resident of Virginia, under the act of 1792. Chap. 90, § 5. *Ibid.*

49. A deed executed under a power of attorney, commences in the name of the grantor by the attorney and is signed in the name of the attorney for the grantor. *Bryan v. Stump*, 8 Grat. 148.

50. A deed which conveys all the property of the grantor in trust for the payment of his debts is valid, though it provides that no creditor shall take any benefit under it, who does not, within thirty days signify his acceptance of its provisions and agree to release the grantor from all further claim for the debt acknowledged therein. *Phippen v. Durham et als.* 8 Grat. 457.

51. A deed, with an acknowledgment certified by the Mayor of New York, intended to be made under the act of 1785, though the certificate bears date a short time before the act went into operation, may be admitted to record.—*Hasler's lessee v. King*, 9 Grat. 115.

52. Though not admitted to record within the time prescribed by the act 1785, it was properly admitted in 1833 under the act of 1819, and being authenticated for record is admissible in evidence without further proof, though not recorded. *Ibid.*

53. Both parties to a suit, trace their title to a deed recorded in the County of H., the land lying in another county, the subsequent deeds,

through which the defendants claim refer to the deed as recorded in H. They cannot object to its validity for want of registry in the county where the land lies. *Hamun et als v. Harman*, 9 Grat. 146.

54. A commissioner for the sale of delinquent lands conveys under a power, and a deed executed by him to other persons than those reported by him as the purchasers, can avail nothing where his authority to make it does not appear, unless long acquiescence and possession raises a presumption in its favor. *Walton v. Hale* 9 Grat. 194.

55. The recitals in such a deed are not evidence against a party claiming adversely to the deed. *Ibid.*

56. A deed conveys land, mills and appurtenances, which includes an acre of land on the opposite side of the stream, condemned for an abutment, and reserves the right to build a saw mill on the opposite side of the stream or at the further end of the stream, the reservation is uncertain and ejectment can not be maintained for it. *Butcher v. Creels heirs* 9 Grat. 201.

57. The principle which is applied to wills in respect to the capacity to make a valid devise applied to deeds. *Greer v. Greers* 9 Grat. 330.

58. Although a grantor may labor under no legal incapacity to do a valid act, yet if the whole transaction, with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. *Ibid.*

59. A., largely indebted makes a gift of slaves, but retains possession of them, subsequently he makes a deed of land to the donees, in lieu of the slaves. Held: void as to creditors. *Fores v. Rice et als.* 9 Grat. 568.

60. In such a case, the grantee's being females and having married, the deed will be void as to the husbands, unless they show that the marriage took place before the creditors recovered their judgments, but the deed being valid between the parties, any other land of the grantor's will be first applied to pay his debts. *Ibid.*

61. *Monomania*, in no way connected with the subject of a contract, will not invalidate a bond and deed, made in execution of the contract.

*Boyce's adm'r et als. v. Smith* 9 Grat. 704.

62. A creditor at large may maintain a suit in equity to set aside a fraudulent deed, conveying real estate, made by his debtor, both the debtor and the grantee living and being out of the Commonwealth.—*Peay v. Morrisson's exor's* 10 Grat. 149.

63. A father conveys to his daughter for the use of herself and her husband and their joint heirs, slaves, to have and to hold to the daughter, her husband and their heirs, &c. The deed conveys to the daughter and her husband a joint estate.—*Cleland v. Watson*, 10 Grat. 159.

64. Two deeds are executed at the same time, by and to the same parties, one conveys a tract of land, except the part covered by a decree in favor of H., the other conveys a tract of land embracing the land covered by said decree, but without reservation. Held: they are to be taken together as parts of the same transaction, and the reservation in one operates upon the other.—*Anderson v. Harvey's heirs* 10 Grat. 386.

65. A deed conveys part of a tract, beginning at a certain point in a survey mentioned, though there is an obvious mistake in some of the calls of the survey, the beginning corner must be, as in the deed. *Smith et als. v. Chapman*, 10 Grat. 445.

66. An actual possession of land, claiming adversely, does not prevent the operation of the deed made by the commissioner of delinquent lands, conveying to the purchaser the commonwealth's right to the land. *Ibid.*

67. A deed of trust and power of attorney executed at the same time to same party are to be construed together. *French v. Townes et als.* 10 Grat. 513.

68. Virginia, by statute, cedes to the United States 250 acres of land and directs the Governor to convey it. He directs a survey. And upon the surveyor's report executes a deed, taking course and distance from the report, but without reference to it. In determining the boundaries, the statute, report and deed must be looked to, to define them. *French v. Bankhead*, 11 Grat. 136.

69. Looking to the statute, report and deed, the intention was to convey to high water mark. Under the act of 1 Rev. Code 1819, ch. 87, p. 341, the conveyance by high water mark boundary passed the soil and jurisdiction to low water mark. *Ibid.*

70. A husband is not a competent subscribing witness to a deed conveying real estate to his wife, either to prove due execution or to have it admitted to record and if admitted to record, on proof of the husband, is void as to creditors. *Johnston and wife v. Slater et al.* 11 Grat. 321.

71. A deed of trust conveying crops &c., not to be enforced for two years is not fraudulent *per se*, and though executed without the knowledge of those secured, if when informed of it, they assent to it, it is valid. *Cochran v. Paris et als.* 11 Grat. 348. *Dance et als. v. Seaman et als. id.* 778.

72. If a deed of a defendant is collaterally introduced, upon a trial, he may shew it is not his deed, without making oath to the fact.—*Harrison v. Middleton*. 11 Grat. 527.

73. A party claiming under a deed from a Deputy for delinquent land, sold under the act Feb. 9th 1814, must show that the person described as high sheriff was such, and that the grantor in the deed was his deputy. *Hobb's v. Shumater*, 11 Grat. 516.

74. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated, but is valid to convey such title as by law, the sheriff was authorized to convey. *Ibid.*

75. A deed which amply provides, in the first place, for all the then existing debts of the grantor and then settles the balance of his property on the grantor's family, in the absence of actual fraud, is a valid deed. *Johnston v. Zane's trustees et als.* 11 Grat. 552.

76. To avoid a deed, at the suit of a subsequent creditor, actual fraud must be shewn. *Ibid.\**

77. A conveyance of land by the commissioner of delinquent lands, passes the title vested in the commonwealth, though the land is in adverse possession of another. *Levasser v. Washburne*, 11 Grat. 572.

78. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass title to the grantee. *Knicheloe v. Tracewells*, 11 Grat. 587.

79. A conveyance of land and slaves upon trust to permit the slaves to live upon the land and take the profits thereof and their own labor to their own use, they still continuing slaves, passes nothing to the grantee or to the slaves. *Smith adm'r v. Betty et als.* 11 Grat. 752.

80. Neither the declarations of the grantor before or after the execution of a deed, nor the declarations of the agent in procuring the deed for another, before the negotiation was commenced or after the execution, are competent evidence against the grantee in the deed, to show fraud. But the acts and declarations of such agent, done or made while the negotiations were pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. *Ibid.*

SEE MORTGAGE, AND DELINQUENT LANDS.

---

## DEFEASANCE.

C. makes an absolute bill of sale of slaves to F. for value; and F. executes to him an obligation, that upon C.'s producing evidence of the payment of a certain debt for which F. is bound as surety for W., that he will cancel the bill of sale. This is not a mortgage, but a conditional defeasance. *Forkner v. Stuart*, 6 Grat. 197.

\* See Code of Va. chap. 118 § 2 p. 508.

## DELINQUENT AND FORFEITED LANDS.

1. The provision in the act of March 30, 1837, to amend and explain the laws concerning western land titles, which directed that commissioners of delinquent lands should be appointed in each county, at the next fall term of the Superior Court, is merely directory, and such commissioners may be appointed at a subsequent term. And if a new county is afterwards created, such commissioners may be appointed therein. *Hoge v. Currin* 3 Grat. 201.

2. On a sale of land under the tax laws, the commonwealth does not warrant either the title or description of the lands sold. *Ibid.*

3. The recitals in the deed of a commissioner of delinquent lands, are not evidence against a party claiming adverse to the deed. *Walton v. Hale*, 9 Grat. 194.

4. A commissioner for the sale of delinquent lands conveys under a power, and a deed executed by him to other persons than those reported by him as the purchasers, can avail nothing where his authority to make it does not appear, unless long acquiescence and possession raises a presumption in its favor. *Ibid.*

5. The statutes of Virginia forfeiting lands to the commonwealth for the failure of the owners to enter them upon the commissioner's books and pay the taxes due thereon, are constitutional. *Wild's lessee v. Serpell*, 10 Grat. 405.

6. The forfeiture under these statutes is perfected without a judgment, decree, or other matter of record, or an inquest of office; but by the operation of the statutes the title is divested out of the owner and is vested in the commonwealth. *Ibid. Staats v. Board*, *id.* 400.

7. Lands omitted to be entered on the commissioner's books were forfeited under § 2 of the act of February 27th, 1835, Sess. Acts, p. 12, and the forfeiture became perfect and consummate on the 1st of November, 1836, the period limited in which the forfeiture might be saved by complying with the provisions of the act of March 23d, 1836, Sess. Acts, p. 7. *Ibid. Staats v. Board*, *id.* 400, *Hale v. Branseum*, *id.* 418.

8. The act of March 30th, 1837, Sess. Acts, p. 9, giving time for redemption until the 15th of January, 1838, did not release the forfeiture which had accrued, except in cases where the owner or proprietor availed himself of the privilege of redemption. *Staats v. Board*, 10 Grat. 400.

9. From the time that land is forfeited to the commonwealth, under the act of 1835, Sess. Acts, p. 11, time will not run in favor of a party in possession, against the commonwealth, or those claiming under her by patent. *Ibid. Hale v. Branseum*, *id.* 418.

10. QUÆRE: Whether after the lien of the commonwealth for taxes at-



taches to lands, any possession adverse to the proprietor can operate so as to impede the right of the commonwealth to subject said lands to sale or forfeiture for such taxes; and, as a consequence, to transfer to a purchaser, or vest in an actual occupant, or subject to re-entry and grant, such forfeited lands. *Staats v. Board*, 10 Grat. 400.

11. Where the title is vested in the commonwealth and the forfeiture enures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person, is perfect and complete, without any new grant from the commonwealth or any proceeding to manifest the transfer, by matter of record or otherwise. *Wilds lessee v. Serpell*, 10 Grat. 405.

12. A party claiming under a grant from the commonwealth issued in August, 1836, cannot claim the benefit of an older title forfeited to the commonwealth under the act of February 27th, 1835, because by that act a forfeiture only enured to the benefit of those who claimed title under a grant from the commonwealth, bearing date before April 1st, 1831. *Ibid.*

13. Nor can such a party sustain such claim under the provisions of the act of March 30th, 1837, unless he is a *bona fide* occupant of the land. *Ibid.*

14. To sustain such a claim under § 16 of the act of March 16th, 1838, Sess. Acts, p. 21, the party must have been, at the date of the act, in the actual possession and occupancy of the land forfeited, or a part thereof, with title *bona fide* claimed or derived under a grant from the commonwealth, which issued subsequent to the 31st of March, 1831, and prior to the 1st of January, 1838. *Ibid.*

15. By the act of March 18th, 1841, Sess. Acts, p. 31, the forfeiture of title to the commonwealth only enures to the benefit of those then in actual possession of the forfeited land, under claim of title through a grant from the commonwealth. Though at that time a party held a patent for the land, yet, if he was in actual possession, under a lease from another person, claiming the elder title, that is not the actual possession contemplated. *Ibid.*

16. By the act of March 22d, 1842, Sess. Acts, § 3, p. 13, the title to forfeited lands is transferred to, and vested in such persons, other than those for whose default the same may have been forfeited, as had title or claim, legal or equitable, derived under grant from the commonwealth, bearing date prior to the 1st of January, 1843, without making either actual occupancy or actual possession of the land, or a *bona fide* claim of title, any part of the condition on which the transfer of the title takes effect. *Ibid.*

17. The act of March 22d, 1842, Sess. Acts, p. 13, is retrospective in its operation. *Ibid.*

18. Though the land had been reported to the court as forfeited land, and

an order had been made for the sale thereof, yet, if not actually sold before the passage of the act, the title is transferred under the statute. *Ibid.*

19. By the operation of the act of March 5th, 1836, Sess. Acts, p. 7, the title acquired by the commonwealth by the forfeiture of land for failure to enter it upon the commissioner's books, and pay the taxes vested in the party obtaining a patent for the land, in June, 1846. *Hale v. Branseum*, 10 Grat. 418.

20. In a sale by a commissioner of delinquent lands, under an order or decree of the court, no action of the court or the commissioner can alter the point of the beginning corner of the survey of the land sold; but that must be fixed by the deed. *Smith et al. v. Chapman*, 10 Grat. 445.

21. In ascertaining the boundaries of the land claimed by a plaintiff in ejectment, who claims as a purchaser of part of a large tract sold by the commissioner of delinquent lands, no regard is to be had to any private arrangements or divisions by the plaintiff and other purchasers of parts of the same tract of land at the same sale. *Ibid.*

22. An actual possession of land claiming the same adversely, does not prevent the operation of a deed made by a commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land. *Ibid.*

23. A purchaser at a sale of lands made by a commissioner of delinquent lands, is not bound to prove that all the previous proceedings of the commissioner and the court were regular. The proceeding is in the nature of a judicial proceeding, and the orders and decree of the court made in it are conclusive, at least upon all strangers. *Ibid.*

24. Land is forfeited to the commonwealth under distinct titles. Upon a proceeding to have the land sold under either title, the sale and conveyance passes all the title vested in the commonwealth. *Ibid.*

25. Land is forfeited under one title in one county, and under another title in another county; the land in one patent extending into both counties. The court in which the proceeding is first commenced for the sale of the land, has jurisdiction of the subject; and the sale and conveyance under its decree passes all the title of the commonwealth, though the conveyance under the decree of the court of the other county was first executed. *Ibid.*

26. In a sale of land for taxes, under the act of February 9th, 1814, 2 Rev. Code 542, by the circumstances of the sale which are to be recited in the deed, are not meant all the steps taken by the various officers, which precede the sale; but the circumstances attending the sale itself, viz: That the sale was made at the time and place prescribed for the sale of lands returned delinquent for non-payment of taxes; if less than the whole lot or tract was sold, how much; who was the purchaser, and the amount of purchase money. *Flannagan v. Grimmer et als.* 10 Grat. 421.

27. It is not necessary that the deed shall state that the land been had advertised. *Ibid.*

28. If the deed recites that the land was advertised in a mode that did not conform to the statute, yet as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed. *Ibid.*

29. The deed cannot be questioned by parol proof of the failure to advertise the sale as the law prescribes. *Ibid.*

30. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing the commonwealth's right to forfeited lands to a junior patentee in possession, only applies to those whose patents bear date prior to the 1st of April, 1841. *Levasser v. Washburn*, 11 Grat. 572.

31. A patent for that land had been previously granted by the commonwealth, and had been forfeited under the delinquent laws, passes nothing to the patentee; and a conveyance of the land forfeited by the commissioner of delinquent land, passes the title vested in the commonwealth by the forfeiture. *Ibid.*

32. A party claiming title under a deed from a deputy sheriff, for land sold for non-payment of taxes under the act of February 9th, 1814, must show that the person described as high sheriff, was such; and the grantor in the deed was his deputy. *Hobbs v. Shumates*, 11 Grat. 516.

33. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey. *Ibid.*

---

## DEMURRER.

SEE PLEADING.

---

## DEPOSITIONS.

1. QUÆRE: Whether the testimony of a witness examined to sustain a will, taken down in writing before the Court of probat, is to be read upon the trial of the issue as a part of the sentence of the Court. *Coalter's ex'or et als. v. Bryan and wife et als.* 1 Grat. 19.

2. A person taking a deposition under a regular commission and notice, certifies that the deposition was taken before him, with the addition to his name of "J. P." It sufficiently appears. he was a justice of the peace. *Pollard's heirs v. Lively*, 2 Grat. 216.

3. A witness giving his deposition *de bene esse*, states in it, that he is unable from his age and health to attend at the Court. This is sufficient to authorize his deposition to be read as evidence upon the trial of the cause. *Ibid.*

4. The Court of Appeals will presume that a deposition has been taken upon a regular commission and notice, when no objection has been taken to it, on that ground in the Court below. *Ibid.*

5. An exception to the admission of a deposition as evidence, for an irregularity in taking it, must state the grounds of the objection, or this Court will not notice it. *Barker v. Barker's adm'r*, 2 Grat. 344.

6. In taking an account, a commissioner may take depositions, under his general notice. *McCandlish, adm'r, &c. v. Edloe et als.*, 3 Grat. 330.

7. A deposition given in answer to leading interrogatories, ought not to be suppressed on that ground, otherwise than by order of Court made before the hearing, on motion or petition for that purpose, and founded on an exception endorsed on the deposition within a reasonable time after the return thereof, or on an exception taken at the time of the examination, if the party excepting was present. *Ibid.*

8. An exception to part of a deposition does not designate the part excepted to; but it is brought to the notice of the court, and acted on by the court, and read under an instruction applicable to it. The objection to the form of the exception does not arise. *Charlton v. Unis*, 4 Grat. 58.

9. The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. *Cales v. Miller et als.*, 8 Grat. 6.

10. In a case of probat, the deposition of an aged witness taken *de bene esse*, allowed to be read upon proof, either by witnesses or his own affidavit, of his inability to attend the court. *Nuckol's adm'r v. Jones*, 8 Grat. 267.

11. A commissioner appointed by the circuit court to take depositions, had authority under the act, Sup. Rev. Code, p. 165, § 80, and 1830, Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common law cause. *McGuire et als. v. Pierce, assignee, &c.*, 9 Grat. 167.

12. Pending a second action on a bond, plaintiff having suffered nonsuit in the first, the deposition of a witness was taken, *de bene esse* and relied on without objection, there was a nonsuit in the second action; on the trial of a third action the deposition was objected to, on the ground that no affidavit was made before the clerk, for issuing the commission. *Held*: That after nearly eighteen years, the affidavit may be presumed to have been lost; and further, that no objection having been made until after the depo-

sition had been read on the second trial, and after the death of the witness, the objection must be overruled. *Perkins, adm'r, v. Hawkins' adm'r*, 9 Grat. 649.

13. The affidavit of a witness that from his age and infirmities, he is unable to attend the Court, without endangering his life, made eight days before the cause is called for trial, is sufficient to authorize his deposition, which had been taken *de bene esse*, to be read in evidence. *Taylor v. Smith*, 10 Grat. 557.

14. A deposition, purporting in the caption to have been taken in the State and County, designated in the commission and notice and certified by a person who signs with his name the letters J. P. is duly authenticated. *Hobbes v. Shumates*, 11 Grat. 516.

---

## DETINUE.

1. In an action of detinue for a female slave, the recovery may be not only for the slave named in the writ, but for her children born since the commencement of the action. *Morris v. Peregoy*, 7 Grat. 373.

2. Where a defendant in detinue dies, and the action is revived against his administrator with the will annexed, the plaintiff is entitled to demand from the administrator not only the property sued for, but damages for its detention, and the costs incurred in prosecuting the action against the testator in his life-time. *Hunt's adm'r v. Martin's adm'r*, 8 Grat. 578.

3. The *scire facias* to revive the action of detinue against an administrator, should suggest the coming of the property into the possession of the administrator since the death of his intestate. And the *scire facias* not being in the record, nor in the clerk's office of the court below, and no objection appearing to have been taken to it in that court, the Court of Appeals will presume that it was in all respects regular. *Ibid.*

4. Where an action of detinue is revived against an administrator, and judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administrator, to be levied of the goods, &c. of his intestate in his hands to be administered. *Ibid.*

5. The fact that slaves are on the premises of a person who makes no claim to them, his infant daughter, who claims them, living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them. *B. Staton v. Pittman, sheriff*, 11 Grat. 99, and *Pittman, sheriff, v. R. Staton, Id.*

## DEVASTAVIT.

1. An administrator permitting a person who has in possession of *choses in action* of his intestate in his life-time by assignment for collection, to collect the said *choses*, and appropriate the proceeds to his own use, under an invalid claim of title thereto, is guilty of a *devastavit*. *Miller and wife v. Jeffress et als.*, 4 Grat. 472.

2. *Quære*; What would be the effect generally of a judgment against an administrator *de bonis non*, in establishing a debt against the estate, so as to conclude a former executor or administrator, and thereby subject him to a *devastavit*. *Sheldon et als. v. Armstead's adm'r et als.*, 7 Grat. 264.

3. The prior executor having paid over the assets to the legatees of the heir, with full notice of the claim of the legatees of the first testator and after suit revived against him, such payment constituted a *devastavit*. *Ibid.*

4. A part of the assets of the heir's estate having been retained by the prior executor and recovered by suit from his executor by the administrator *de bonis non* of the heir, the prior executor is to be credited with the amount so recovered. *Ibid.*

## DEVISEES.

1. Heirs and devisees are entitled to the rents and profits of the real estate descended or devised, until a decree of the Court subjecting them to the payment of debts. *Hobson v. Yancey et als.*, 2 Grat. 73.

2. The heir or devisee is entitled to the interest upon the surplus proceeds of land sold by a trustee after the death of the grantor in the trust deed, up to the time of the decree directing the distribution of said surplus proceeds among creditors. *Jones v. Lackland et als.*, 2 Grat. 81.

3. Upon a bill filed against an executor, to subject land to the payment of a debt, to which the devisees are not parties, there is a decree, and a sale and conveyance which is confirmed, the decree does not bind the devisees. *Hudgin v. Hudgin's ex'or et als.*, 6 Grat. 320.

4. Testator charges his whole estate with the payment of his debts. Devisees must contribute ratably with legatees to pay debts. *Elliot v. Carter et als.*, 9 Grat. 541.

5. Testator by his will gave his wife a plantation, slaves, stock, &c., for life. And he then added, it is understood that my wife is to keep my children, and raise them, and give them sufficient schooling. *Held*: 1st. The widow takes the bequest *cum onere*, and is bound to provide for the support and education of the children, in a manner suitable to her circumstances.

2nd. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not bound for the expenses of the child for board, clothing, and education. *Crawford's ex'or v. Patterson*, 11 Grat. 364.

6. It seems that a void condition precedent annexed to a devise of land, will prevent the vesting of the devise in the devisee. *Maddox et al. v. Maddox's adm'r et als.*, 11 Grat. 804.

See WILLS.

## DISCOUNTS.

1. The act, Sup. Rev. Code, p. 157, ch. 62, authorizing defences in the nature of set-off, authorizes such defences in actions of replevin. *Murray, Caldwell & Co. v. Pennington*, 3 Grat. 91.

2. In a lease, the lessor covenants to put certain repairs upon the demised property, which he fails to do. In an action of replevin on a distress for rent, the lessee may set off the damages he has sustained by the failure of the lessor to make the repairs. *Ibid.*

## DISCOVERY.

1. A defendant is not bound to disclose or answer matters which will expose him to pains, penalties, or punishment, or to a criminal prosecution. And if he will probably be subjected to danger by his answer, he will be protected. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. If the objection to the discovery appears upon the face of the bill, the defendant may demur. *Ibid.*

3. If the objection does not appear upon the face of the bill, the defendant must claim his protection by plea, or answer, the averments of which, if traversed by replication, must be established by sufficient evidence. *Ibid.*

4. An answer to a bill of discovery is sufficient, when it shews the defendant is protected from making the discovery sought in the bill. *Ibid.*

5. *Quære*: If defendant at law may not have discovery and relief founded thereon, after judgment upon a gaming debt. *White v. Washington's ex'or*, 5 Grat. 645.

6. The general rule is, that when a party comes into equity for a discovery, the court will retain the cause, and give the proper relief founded on

the discovery ; unless where it is sought to be used in a pending action at law. *Lyons v. Miller*, 6 Grat. 427. #

7. A party to a cause is not bound to answer interrogatories which may subject him to a penalty or forfeiture. *Poindexter, &c. v. Davis et als.*, 6 Grat. 481.

8. This rule is not confined to cases where the purpose of the suit is to enforce the penalty or forfeiture, but extends to those where the discovery itself would expose the party to some action, or any criminal, or penal prosecution, tending to the like result. *Ibid.*

---

## DISSEISIN.

1. The entry of the elder patentee upon, and the possession of the land within his elder grant, not embraced by the grant of the junior patentee, can not oust the junior patentee, if at the time of the entry of the older patentee, the junior patentee had actual possession of the land embraced by his grant. *Taylor's devisees v. Burnsides*, 1 Grat. 165.

2. *Quære*: Whether the possession of the junior patentee will be limited to his inclosure, by the actual possession of the elder patentee, of a part of the land embraced in his grant, not embraced within the limits of the grant of the junior patentee. *Ibid.* And *Overton's heirs v. Davisson, Id.*, 211.

3. *Quære*: If the entry of him claiming under the elder grant, upon his land not embraced in the junior grant, will limit the junior patentee's adversary possession to his actual close. *Ibid.*

4. If a junior patentee enters upon land embraced by his own and an elder grant, and takes and holds possession thereof, claiming title to the whole under his grant; this is an ouster of the elder patentee to the extent of the limit of the junior grant; if the elder patentee had no actual possession of any part of the land within the limits of his own grant. *Overton's heirs v. Davisson*, 1 Grat. 211.

5. If the elder patentee is in the actual possession of any part of the land in controversy, when the junior patentee enters upon it, the adversary possession of the junior patentee can only extend to the limits of his enclosure, unless he ousts the elder patentee from the whole land in controversy. *Ibid.*

6. While patented lands remain in a state of nature, the elder patentee cannot be disseised thereof, unless by acts of ownership effecting a change in their condition. *Ibid.*

7. Though a great lapse of time and other circumstances may warrant the presumption of a disseisin or ouster by one coparcener or tenant in



common of another not laboring under disabilities, this presumption is a matter of fact for the consideration of the jury and not a matter of law for the judgment of the Court, or a special verdict. *Purcell and wife et als v. Wilson*, 4 Grat. 16.

---

### DISTRIBUTEES.

1. Distributees of a foreign intestate, receiving assets, are responsible here for the debts of their intestate, to the amount of assets received. *Hairston v. Medley*, 1 Grat. 96.

2. Distributees receiving assets of the estate from the administrator, may be compelled to refund for payment of debts, the amounts so received, with interest. *Cookers v. Peyton*, 1 Grat. 431.

3. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties. *Sillings et als v. Bumgardner, guardian*, 9 Grat. 273.

4. One distributee, who is guardian of another sues in his own name as guardian, to recover his wards interest and obtains a decree. An appellate Court will reverse the decree because he cannot thus sue, but will send the cause back, that the bill may be amended and the proper parties made. *Ibid.*

---

### DONATIO MORTIS CAUSA.

1. A delivery is indispensable to the validity of a *donatio mortis causa*. *Miller and wife v. Jeffress et als.*, 4 Grat. 472.

2. It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*. *Ibid.*

3. A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or of the donee. *Lee's ex'or v. Boak*, 11 Grat. 182.

---

### DOWER.

1. Husband during coverture sells and conveys land with general warranty; but his wife does not join in the conveyance. By his will, he gives his whole estate, real and personal, to his wife for her life, remainder to her children, she is entitled to take under the will and also to have her dower in the land sold. *Higginbotham v. Cornwall*, 8 Grat. 83.

2. That a provision for a wife in her husband's will should be in lieu of dower, the will must so declare in terms, or the conclusion from the provisions of the will ought to be as clear and satisfactory, as if it had been expressed. *Ibid.*

3. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she should survive him, which were to be in bar and satisfaction of her dower. This agreement barred her of her dower in her husband's real estate. *Findlay's ex'ors v. Findlay*, 11 Grat. 434.

4. A purchaser of land gives bond with security for the purchase money; and eighteen months afterwards gives a deed of trust on the land for further security, and the land is afterwards sold. The widow of the purchaser is entitled to dower in the land. *M. Blair v. Thompson et als*, 11 Grat. 441.

5. In a bill by a widow for dower in land sold in the life-time of her husband, and coming to the present owner, through several intermediate conveyances, the present owner is the only necessary party defendant. *Ibid.*

6. There cannot be a decree for a specific sum in lieu of dower, without the assent of all the parties interested. *Ibid.*

## DYING DECLARATIONS.

1. On a trial for murder, the dying declarations of the deceased, if made in expectation of death are competent evidence against the prisoner. *Hill's case*, 2 Grat. 594.

2. The evidence of the deceased's expectation of death, is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. *Ibid.*

3. Regularly the Court ought first to ascertain that the deceased was in expectation of death, before allowing his dying declarations to go in evidence before the jury, but if first given in evidence, and it appears afterwards that they were proper evidence, it is no error of which the prisoner can complain. *Ibid.*

## EJECTMENT.\*

1. Ejectment may be maintained by the Commonwealth or her grantee against the former owner, for the site of a bridge on a public road located

\* See Code of Virginia, chap. 135, p. 557, *et seq.*

under an act which provides, that when the road is located and a map thereof returned to the clerk's office of the counties through which it passes, the land shall be vested in the Commonwealth for the use of the road. *James River & Kanawha Co. v. Thompson & Teays*, 3 Grat. 270.

2. Ejectment may be against the party in possession under a perpetual equitable lease. *Carrington et als. v. Otis et als.*, 4 Grat. 235.

3. Lessee in possession having agreed to take a lease from the plaintiff in ejectment if his title was the best, the agreement will be no bar to a recovery in the action. *Ibid.*

4. A general judgment for costs against two defendants in ejectment is proper, though one of them did not enter himself a defendant until there had been one trial of the cause, and a large portion of the costs had been incurred. *Middleton v. Johns et als.*, 4 Grat. 129.

5. A person having held actual possession of land for fifteen years, under color of title, and being then ousted by another, who is a mere trespasser without pretence of title, may recover in ejectment against such trespasser, though it does not appear that the land has ever been granted by the Commonwealth. *Ibid.*

6. A deed conveying lands, mills thereon, and appurtenances, which includes the acre of land on the opposite side of the stream condemned for an abutment, reserves the right to build a saw mill on the opposite side of the river, or at the further end of the dam. The reservation is too uncertain to withdraw any part of the land from the operation of the deed; and ejectment cannot be maintained for it. *Butcher v. Creel's heirs*, 9 Grat. 201.

7. A party in peaceable possession is entered upon and ousted by one not having title to or authority to enter upon the land. The party ousted may recover the premises, in ejectment, upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself has title or authority to enter under the title. *Tapscott v. Cobbs et als.*, 11 Grat. 172.

8. Where an ancestor dies in possession of land, the presumption of law is, that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title or authority to enter under the outstanding title in another. *Ibid.*

9. In ejectment the jury set out the wills of a grandfather and father; and if the son, who is dead, took under the father's will, they find for the plaintiff; if he took under the grandfather's will, they find for the defen-

dants. The verdict is sufficiently certain, and submits the single question upon the construction of the wills to the court. *Callis et als. v. Kemp et als.*, 11 Grat. 78.

10. Though in ejectment the plaintiffs in their declaration claim the whole tract of land, the jury may find for them for an undivided interest in it. *Ibid.*

11. Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient. *Ibid.*

---

## ELECTION.

1. A party cannot claim under a will and against it. *Dickinson v. Dickinson's adm'r et als.*, 2 Grat 493.

2. An executor cannot elect to hold a legacy as guardian of the legatee until it is payable, (he being both executor and guardian,) so as to relieve his sureties as executor and change his sureties as guardian. There must be some act or declaration by him, to indicate that he holds a legacy as guardian. *Swope v. Chambers*, 2 Grat. 319.

3. The rule that a party shall not claim against and under a will, applies only where the thing demanded is devised or bequeathed to another by the will. *Norman's ex'x v. Cunningham and wife et als.*, 5 Grat. 63.

4. Heirs of the wife may claim compensation for land of her's sold by the husband, though they have taken devises and legacies under his will. *Ibid.*

5. Land is given to husband for life, but with power to elect within three years to have the land sold, and to take a sum of money absolutely. If he elects within the three years, the election is not defeated by his death before the land is sold. *Washington's ex'or v. Abraham et als.*, 6 Grat. 66.

6. A testator gives his mother a legacy worth about \$300, and in another clause of his will says: "It is my desire that my mother give my sister A, Abby, with her present and future increase." These slaves belong to the mother. The mother, though she takes the legacy, is not bound to give the slaves to the sister. *Crumpt et als. v. Redd's adm'r et als.*, 6 Grat. 372.

## ELEGIT.

An *elegit* issued upon a judgment rendered against a bankrupt before his bankruptcy, may be in the usual form ; and, in executing it, the sheriff must take notice of the bankruptcy of the debtor, and disregarding all his property not subject to the lien of the judgment, levy the *elegit* upon that which is so subject. *McCance v. Taylor*, 10 Grat. 580.

## EMANCIPATION.\*

1. Slaves may be emancipated by nuncupative will under the Act, 1 Rev. Code, p. 433, § 53. *Phoebe et als. v. Bogges et al.*, 1 Grat. 129.

2. A testator, by her will, emancipates certain of her slaves, and then says : " All the rest of my slaves I lend to my brother and sister equally, during their lives and the life of the survivor ; and on the death of the survivor, it is my desire that the said slaves be set free." The slaves alive at her death, and their descendants born during the lives of the brother and sister and of the survivor, and those born after the death of the survivor, are emancipated by the will. *Lucy et als. v. Cheminant's adm'r*, 2 Grat. 36.

3. A testator bequeaths a female slave to his daughter, " not as a bound slave, but to be under her care and tuition, to receive wages for her labor ; and if she should have children, for them to come under the same regulations, after they pay for their raising, but their labor to be equally amongst all my children, if they choose to employ them." *Held* : 1st. The slaves are not emancipated. 2nd. The bequest to the daughter is void. 3rd. The testator is intestate as to these slaves. *Wynn et als. v. Carroll et als.*, 2 Grat. 227.

4. A condition subsequent, annexed to a provision in a will, emancipating a slave is void. *Forward's adm'r v. Thamer*, 9 Grat. 537.

5. Slaves emancipated by will, though sold under executions on judgments against the testatrix, may maintain a suit in equity to recover their freedom, if there be other estate of the testatrix sufficient to pay the debts of the estate, or if the assets, together with the hire of the negroes for a reasonable time will be sufficient for that purpose. *Jincey et als. v. Winfield's adm'r et als.*, 9 Grat. 708.

6. The owner of slaves took them to New York for the purpose of emancipating them and executed them a deed of emancipation attested by one witness. After remaining there a few days, he returned to Virginia with them, and ever afterwards he treated them as free negroes. *Held* : 1st. That the owner of the slaves having taken them to New York for the pur-

\* See Code of Virginia, chap. 103, and chap. 106.

pose of emancipating them, they were by the laws of New York free and so continued after their return to Virginia. 2nd. That the acts of the owner of the slaves were not such a fraud upon the laws of Virginia as rendered his acts null and void. *Foster's adm'r v. Foster*, 10 Grat. 485.

## EMBEZZLEMENT.

1. Under the act of February 9, 1831, for regulating the navigation of James River, above the falls, the offence of embezzlement is not confined to owners or captains of boats. *Smith's case*, 4 Grat. 532.

2. A prisoner sent on by the examining Court to be tried for embezzlement of the goods of W. may thereupon be indicted for embezzling the goods of A.; the embezzlement being of the same goods, for which he was tried by the examining Court. *Adcock's case*, 8 Grat. 661.

## ENDORSEMENT.

1. Endorsements upon negotiable paper, made for the accommodation of the drawer, import not a joint, but a several and successive liability, each endorser being responsible, *prima facie*, to all who succeed him. *Bank of U. S. v. Beirne*, 1 Grat. 234.

2. It is to be shewn by the party claiming the endorsements to have been made with the intention of joint liability, that such was the intention. *Ibid.*

3. An endorser residing in a district of country, passing under a particular name, and having a post office within it, and being equidistant from that office and another out of the bounds of the district, a notice sent to the first office is sufficient, though in fact the endorser was accustomed to receive his letters and papers from the other office. *Rand v. Reynolds*, 2 Grat. 171.

4. A third endorser having endorsed a note on the faith of the solvency of a prior endorser, and on the renewal of a note, the order of the endorsements having been changed without the consent of this third endorser, who for the convenience of renewing the note, had left his blank endorsement with the makers; a Court of Equity will relieve him as against the endorser who should have preceded him. *Slagle v. Rust's adm'r*, 4 Grat. 274.

5. The several accommodation endorsers of negotiable paper are responsible in the order of their endorsements, unless there has been an agreement among them to be jointly and equally bound; and the burden of proving such an agreement is upon the prior endorser, who seeks the benefit of it. *Hogue v. Davis et als.*, 8 Grat. 4.

6. An endorsement on a bond, though made at a subsequent day, is to be considered as a part of the bond. *Price v. Kyle*, 9 Grat. 247.

7. An endorsement on a marriage contract, of the same date, is to be considered as a part of the contract. *Eidson v. Fontaine, adm'r. &c. et als.*, 9 Grat. 286.

8. An endorsement on a marriage contract, made by the husband after the marriage, cannot have any effect upon the rights of the wife. *Ibid.*

9. An endorsement on a bond being equivocal in its character, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to to ascertain what kind of instrument was within their contemplation and design. *Smith's ex'or v. Spiller*, 10 Grat. 318.

10. The endorsement being, "*Memorandum*: If I do not collect the money due on the within note of my nephew, during my life, then it is never to be collected, and I give it to him. F. S." *Held*: Part of the bond, and irrevocable without destroying it. *Ibid.*

11. In an indictment for forgery, the description of the writing as the endorsement of the person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of technical endorser, but of a different character. *Powell's case*, 11 Grat. 822.

## ENTRY OF LAND.

1. A party can only make an entry of so much land as will be covered by the warrants under which it is made; and if the entry is made by specified boundaries, and these boundaries contain so much more land than his warrants authorize him to enter, that the quantity he is authorized to enter may be laid off in different lines of the entry so that they will not embrace any part of the same land, the entry is void for uncertainty. *Harper & Weston v. Baugh & Seguire*, 9 Grat. 508.

2. If another person makes an entry calling for the same boundaries as the first entry, and entering all the lands embraced in these boundaries not covered by the first entry, as the first entry is void for uncertainty, so also is the second entry void for uncertainty. *Ibid.*

3. The party making the first entry having procured other warrants sufficient to cover all the lands within the boundaries specified in the first entry, not covered by the warrants under which the first entry was made, makes a second entry of all these lands not covered by the first entry. The first entry being void for uncertainty, the second entry is also void for the same cause. *Ibid.*

4. The two entries of the first locator being in fact distinct entries, they can not be treated as one entry, covering the whole land, and thus avoid the objection for uncertainty in the entry. *Ibid.*

5. An entry of waste and unappropriated land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described, that other persons, by using due care and reasonable diligence, may readily find them. *McNeel v. Herald*, 11 Grat. 309.

6. The general or descriptive calls, and the particular or locative calls of the entry, must possess that reasonable degree of certainty which will put a subsequent adventurer duly upon his guard; and the locative calls must be found to be embraced within the descriptive calls, and they should properly be consistent with the latter, and with one another; though, in certain cases, where all the calls of an entry cannot be satisfied, the courts, for the purpose of sustaining it, will reject such as appear vague and repugnant, and hold to those appearing to be certain and consistent. *Ibid.*

7. The objects called for are sometimes so connected with the general history or geography of the country, or its legislation, that the courts will take notice of them, and they will be deemed of general notoriety, and sufficiently identified without further proof. *Ibid.*

8. When the objects called for possess but a local notoriety, the party affirming the validity of the entry must prove the identity of the land intended to be appropriated, and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the surrounding lands, so as to appropriate for himself the adjacent residuum. *Ibid.*

## EQUITABLE DEFENCES AT LAW.

1. The act, Sup. Rev. Code, p. 159-60, authorizing defendant in ejectment or writ of right to set up an equitable title as a defence to the action, limits the defence to cases where the whole contract, and its precise terms, are manifested by plain written evidence. The written contract itself must be produced to the jury, and parol evidence of its contents is inadmissible, though it may have been lost or destroyed. *Davis et als v. Teays et als*, 3 Grat. 283.

2. The equitable defence under this statute is also limited to mortgages and deeds of trust, where the mortgage money has been fully paid, or the trust completely performed, or to sales where the vendee has paid all the purchase money, and performed everything incumbent on him, so as to entitle him to specific execution of the contract in equity, and a conveyance of the legal title without any condition proper in equity to be on him imposed. It must be a sale, and not a partnership in the acquisition of the land, and the terms of the contract must be plain. *Ibid.*



3. The 62 section of the act Sup. Rev. Code p. 157 authorizes the equitable defences allowed by that statute to be made in the action of replevin. *Murray, Caldwell & Co. v. Pennington.* 3 Grat. 91.

4. In a lease, the lessor covenants to put certain repairs upon the demised premises, which he fails to do. In an action of replevin on a distress for rent, the lessee may set-off the damages he has sustained by the failure of the lessor to make the repairs. *Ibid.*

5. Upon an action on a bond given for the hire of two slaves, one of whom was never delivered to the hirer, he is entitled under a special plea filed under the act of April 1831, Sup. Rev. Code, p. 157 to a credit for the hire of the slave not delivered. *Isbell's Adm'r v. Norvell's Ex'or.* 4 Grat. 176.

6. If a plea under the statute authorizing equitable defences at law, sets up a defence not authorized by the statute, but which is a substantial claim against the plaintiff, and he does not demur or move to reject the plea; after verdict it is cured by the statute of *jeofails.* *Pence for &c., v. Huston's Ex'ors.* 6 Grat. 304.

7. *Quære* : If a breach of a covenant of warranty in a deed for land may be set up as a defence to the action, under the act authorizing the setting up of certain defences, by special plea, in the nature of the plea of set-off. *Ibid.*

8. In a plea, under the statute, relying on fraud, in a contract for the hire of a slave; to an action on the bond for the hire, the plea should set out the contract of hiring according to its terms or legal effect, and should allege distinctly any fraud or warrantee in regard to it, upon which they found their defence. *Howell, &c., v. Cowles.* 6 Grat. 393.

9. In an action on a bond given for the purchase money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds, which would require a rescision of the contract out of which the bond originated, and a reinvestment of the obligee with the interest in the land, alleged to have been sold to the obligor. *Shiflett, &c., v. The Orange Humane Society.* 7 Grat. 297.

10. In an action on a bond given for the price of a slave, a special plea under the act of 1831 may aver, in general terms, the unsoundness, and the knowledge and fraudulent concealment of the plaintiff; that on discovering the unsoundness the defendant offered to return the slave and demanded a rescission of the contract, which plaintiff refused; laying the damage at the whole amount of the price, or not laying any damage, and praying for judgment in bar of the action. *Fleming v. Toler.* 7 Grat. 310.

11. If such special plea avers in general terms the unsoundness of the

slave and then adds a specific unsoundness, the defendant may, under this plea, prove any unsoundness and is not confined to the specific unsoundness mentioned in the plea. *Ibid.*

## EQUITABLE JURISDICTION AND RELIEF.

1. A court of equity may sequester the rents and profits of mortgaged or encumbered property, where a forfeiture has accrued; and such rents and profits are necessary to discharge the incumbrances. *Clarke v. Curtis*. 1. Grat. 289.

2. The rents and profits received by the mortgagor or equitable owner, in possession, or which have accrued before an order of sequestration is made, cannot be recovered by him from the mortgagee or vendor. *Ibid.*

3. A court of equity has no jurisdiction to enforce the liability of justices for failing to take sufficient security upon the appointment of a guardian. *Austin v. Richardson*. 1 Gratt. 310.

4. A court of equity has no jurisdiction to enforce the liability of the clerk for failing to take a good bond. *Ibid.*

5. Bill having been taken for confessed as to one of several sureties in a guardian's bond, which is void, should be dismissed as to him as well as to others who had made defence. *Ibid.*

6. A court of equity will entertain the suit of a judgment creditor, when the debtor has, subsequent to the judgment, conveyed his land in trust for the payment of the debts, or on other trusts authorizing the sale of the land and in such case the court will decree a sale of the land to satisfy the judgment. *Taylor's Adm'r et als v. Spindle*. 2 Grat. 44.

7. It is not necessary that a judgment creditor should have issued an *elegit* on his judgment, before coming into equity for relief. *Ibid.*

8. A court of equity will enforce a decree obtained against an executor in a former suit against his sureties. *Hobson v. Yancey et als*. 2 Grat. 73.

9. A purchaser of land at a judicial sale can only obtain relief for defects of title or encumbrances on the property, by resisting the confirmation of the sale by the court, upon the return of the commissioner's report. *Threlkelds v. Campbell*. 3 Grat. 198.

10. The justices before whom a cause was tried, having left the bench, after the verdict was rendered, so that a motion for a new trial could not be made to them, a court of equity will grant it. *Knifong v. Hendricks et als*. 2 Grat. 212.

11. A court of equity will correct a mistake either of law or fact of the

scrivener in drawing a deed, even against *bona fide* creditors of the grantor. *Alexander & Co. v. Newton et als.* 2 Grat. 266.

12. A tenant by the courtesy of lands, purchases the reversionary interest of one of the heirs, another interest is held by infants. A court of equity will decree a partition of the land at the suit of the purchaser and tenant by the courtesy. *Otley v. McAlpine's heirs.* 2. Grat. 340.

13. A court of equity has jurisdiction to grant relief, in a case where a judgment has been obtained against the obligor in a bond by the assignee thereof, under a forged assignment. *Jameson's Adm'r v. Deshields.* 3 Grat. 4.

14. A court of equity has no jurisdiction to restrain one joint devisee of land, from entering thereon, at the suit of a tenant claiming under other devisees. *Baldwin v. Darst.* 3 Grat. 132.

15. The relief afforded in the case of *Marks v. Morris*, 2 Munf. 407 is not appropriate to the case where a part of the consideration of the usurious bond was a pre-existing valid debt. *Bank of Washington v. Arthur et als.* 3 Grat. 173.

16. Equity will not entertain a bill to repeal a patent after ten years. *Goodwin v. McCluer.* 3 Grat. 291.

17. A party having obtained a patent for land with knowledge of a prior equitable title in another and having brought a writ of right for the land. A court of equity will award an injunction to stay proceedings for a reasonable time to afford the tenant an opportunity to get in the legal title, outstanding in a third person. *Ibid.*

18. A court of equity will set aside a patent obtained with notice of a prior entry. *Hagan v. Wardens.* 3 Grat. 315.

19. A court of equity will not entertain a suit by a trustee or *cestui que trust* against purchasers of the trust property claiming adversely, there being no obstacle in the way of proceeding at law. *Sheppards v. Turpin.* 3 Grat. 373.

20. Trustees under an act of assembly, sell and convey land, reserving a ground rent to the proprietor when he shall be ascertained. The deed not having reserved any right of re-entry or distress and containing no covenant by the purchaser to pay the rents, and the proprietor not being a party to the deed, the party claiming under the proprietor, is entitled from the difficulty of proceeding at law, to come into equity to recover the rents. *Mulladay v. Machin's Adm'r.* 4 Grat. 1.

21. A. and B. brothers own adjoining tracts of land and mark a dividing line, which intentionally gives A. a part of B.'s land. They hold and sell

by this line and A. and his vendees improve this land with the knowledge of B. and his vendees. The legal title to B.'s land being outstanding, his vendee obtains a conveyance of the legal title which embraces the land given to A. and recovers it from A. in ejectment. Equity will relieve A. *Stafford v. Carter et als.* 4 Grat. 63.

22. A devise is made of an undivided moiety of land to one B. who sells to P. There being an after born child, and the widow's dower being unequally assigned in other lands and suit brought for the child's portion and to have the widow's dower re-assigned, purchaser may enjoin the collection of the purchase money until the extent of the incumbrances are ascertained. *Price v. Browning.* 4 Grat. 68.

23. An injunction to a judgment will not be allowed, where there has been neglect in making defence at law. *Griffith v. Thompson.* 4 Grat. 147.

24. A court of equity will not try a question of title to, or boundary of land. *Carrington. et als v. Otis et als.* 4 Grat. 235.

25. A tenant for life of slaves, sells some of them—one to an unknown purchaser. Upon a bill in equity, by the remainderman against the curatrix of the tenant for life and the purchaser of one of the slaves, seeking to recover the slaves or the value of those sold and a discovery as to the unknown purchaser, a court of equity will take jurisdiction and will decree the slaves or their value, when sold, to the parties entitled, at their election; all the parties being before the court. *Cross' curatrix v. Cross' legatee.* 4 Grat. 257.

26. A surety having executed his bond to a co-surety, who assigns it, and is insolvent; after judgment against the surety he is entitled to have it for contribution in preference to the assignee. *Wayland v. Tucker et als.* 4 Grat. 267.

27. A third endorser having endorsed a note on the faith of the solvency of a prior endorser, and on the renewal of the note, the order of the endorsements having been changed without his consent, equity will relieve him as against the endorser who should have preceded him. *Slagle v. Rust's Adm'rs.* 4 Grat. 274.

28. In an action by a trustee on an indemnifying bond, the defence is fraud in the deed, but there is a verdict and judgment for the plaintiff. The defendant then comes into equity on the ground of after discovered evidence, establishing the fraud as to some of the debts secured, but not questioning the *bona fides* of others, and asks for an injunction, a new trial and general relief. The court will not grant the new trial, but return the cause and allow the plaintiff to impeach the deed notwithstanding the unsuccessful effort at law. *Billups v. Sears et als.* 5 Grat. 31.

29. The cause being properly in the court of chancery, the plaintiff is entitled to have an account of the trust subject and to have it properly disposed of among the parties interested in it, according to their respective rights. *Ibid.*

30. All persons secured by a deed of trust and named in it are necessary parties to a suit attacking the deed as fraudulent as to some of the *cestui's que trust*, and seeking a distribution of the trust fund. *Ibid.*

31. Equity has jurisdiction to enjoin the removal of slaves from the State by parties in possession, at the suit of a party claiming them as next of kin, where there is no administrator; and the court will proceed to decide the rights of the parties, though the defendant appears and denies that he intends to remove the slaves, and objects to the jurisdiction. *Robinson's Exors v. Day*, 5 Grat. 55.

32. The first plaintiff having but a life estate and dying before the cause is decided, the remainderman may file a bill in the same court to prevent the removal of the slaves and to recover them. *Ibid.*

33. If the cause is ready as to the substantial parties at the regular term, it may be decided at a succeeding intermediate term, though it was not ready at the regular term, as to mere formal parties, who consent to the hearing. *Ibid.*

34. A court of equity will not interfere to give relief to a purchaser or to his sureties under a decree of a court, having jurisdiction of the subject, for errors in the decree or in the proceedings in the cause, where the report of the commissioner has been confirmed. *Worsham v. Hardaway's Adm'r*, 5 Grat. 60.

35. A court of equity will set aside a fraudulent sale of personal property by a debtor, at the suit of a judgment creditor and direct the purchaser to deliver it to a commissioner to sell it. And if the purchaser fail to deliver it to the commissioner, the court will direct an account of its value and subject the purchaser for the value so ascertained. *McNew v. Smith*, 5 Grat. 84.

36. Upon setting aside a conveyance of real estate as fraudulent, at the suit of a judgment creditor, the court can decree the sale of only a moiety of the lands to satisfy the judgment. *Ibid.*

37. If a debtor conveys lands fraudulently, and retains other lands, on setting aside the conveyance, at the suit of a judgment creditor, there will be a decree for the sale of only a moiety of the whole, embracing in said moiety the land retained by the debtor. *Ibid.*

38. In an action at law on a promise founded on a gaming consideration, if the defendant is surprised at the trial and there is a verdict and judgment

against him, he may come into Equity for relief, though he made no effort to obtain a new trial in the common law court. *White v. Washington's Ex'or*, 5 Grat. 645.

39. *Quære*: If such defendant may not come into equity for a discovery, and if the discovery is made, whether he may not have relief, though there was no surprise on the trial at law. *Ibid*.

40. A court of equity has no right to decree a sale of land for the payment of a debt, unless the creditor asking the sale shall shew that the land is legally chargeable in equity for such payment; and even then, until the amount of the debt is ascertained. *Smith et als. v. Flint et als.*, 6 Grat. 40.

41. Where a bill to enjoin the sale of land states facts which, if true, shew the land should not be sold, and is taken for confessed, it is error to decree a sale. *Ibid*.

42. Upon a motion to dissolve an injunction, before answer of the defendant, all the allegations thereof must be taken as true. *Peatross v. McLaughlin*, 6 Grat. 64.

43. A judgment debtor having obtained his discharge as a bankrupt, subsequent to the judgment against him, may enjoin the suing out or levy of any execution on said judgment. *Ibid*.

44. A court of equity will enjoin a judgment on the ground of mistake of the jury, ascertained by after discovered evidence: but the subject of the action being accounts, the court will not direct a new trial at law, but will refer the accounts to a commissioner and will itself give the proper relief. *Rust et als. v. Ware*, 6 Grat. 50.

45. A decree is a lien on the debtor's land and the creditor may come into equity to subject the land in the hands of a donee of the debtor, though the decree has never been revived against the administrator of the debtor and no execution has ever been issued upon it. *Burbridge v. Higgin's Adm'r*, 6 Grat. 119.

46. Where conveyances of a distributive interest in real and personal estate and transfers of bonds, have been made in anticipation of a judgment in an action *ex delicto*, the plaintiff in the judgment, after the debtor has taken the insolvent debtors oath may come into equity to set aside these conveyances and transfers and have the subjects applied to the satisfaction of his judgment. *Greer v. Wright*, 6 Grat. 154.

47. The obligors in the bonds should be parties and the decree should be against each of them for the amount he owes on the bonds, if the same is still liable on the plaintiffs judgment. *Ibid*.

48. If the transferee has received any part of the bonds, or if he, by his

improper acts or negligence has made himself chargeable therewith, he may be decreed against for the amount. *Ibid.*

49. The amount yet due, from the obligors in the bonds, is first to be applied to the satisfaction of the judgment. *Ibid.*

50. It is an error to make a joint and personal decree, in the first instance against the transferrer and transferee of the bonds, for the amount thereof. *Ibid.*

51. If the judgment is not satisfied from the bonds, the distributive interest in the personal estate should be subjected and then the interest in the land. *Ibid.*

52. It is error to direct the transferrer and transferee to surrender the bonds to the sheriff. The decree should be against the obligors. *Ibid.*

53. The written agreement between the maker and payee of a note in relation to the contract in execution of which the note was made, having been lost at the time the judgment was recovered on the note by the holder thereof, and without which agreement the maker of the note could not make his defence at law, of fraud in the procurement of the note, that is a ground for the jurisdiction of a court of equity, to enjoin the judgment. *Vather v. Zane*, 6 Grat. 246.

54. A partner in a firm sells out to a third person and the new firm undertakes to pay the debts of the old firm. The retired partner becomes indebted to the new firm, and executes his bond for the amount of his indebtedness with sureties and this is assigned for value. The new firm fail, not having paid the debts of the old firm and the retired partner pays them. He is entitled to set off the debts so paid against his bond in the hands of the assignee. *Hupp v. Hupp*, 6 Grat. 310.

55. Judgment on a forthcoming bond may be enjoined at the suit of the surety therein on the ground that he has an action pending against the plaintiff in the judgment, for a larger amount and that he is insolvent. *M<sup>c</sup>Clellan v. Kinnard*, 6 Grat. 352.

56. Testator subjects his land to the payment of his debts, a bill is filed by a creditor against the executor to subject the land, to which the devisees are not parties and there is a decree, and a sale and conveyance which is confirmed. The decree not binding the devisees, they recover the land. The purchaser having bought in good faith, is entitled to be substituted to the rights of the creditor and to charge the land to the amount of the debt paid by him. *Hudgin v. Hudgin's Ex'or et als.*, 6 Grat. 320.

57. A court of equity has power to sell infants lands, except where it is expressly prohibited by the testator. *Talley et als. v. Starke's Adm'x et als.*, 6 Grat. 339.

58. Whatever the form of a bill may be, if it states a case for equitable relief and contains a prayer for general relief, relief will be given according to the equity stated in the bill, if sustained by the proofs. *Anderson et als. v. De Soer*, 6 Grat. 363. *Same v. Gallego's Adm'r, id.*

59. The general rule is, that whenever a party comes into a court for discovery, the court will retain the cause and give the proper relief founded on the discovery—unless where the discovery is sought to be used in a pending action at law. *Lyons v. Miller*, 6 Grat. 427.

60. A tender of money in payment of a judgment, will not authorize a court of equity to stop an execution issued upon the judgment, where there is neither allegation nor proof that the defendant in the execution kept the money on hand for the discharge of the judgment. *Shumaker v. Nichols*, 6 Grat. 592.

61. *Quære*: If a court of equity will interfere to arrest an execution on a judgment at law, on the ground that the money had been tendered before the execution was issued. *Ibid.*

62. It is proper to come into equity to investigate a fraud in distraining slaves which are subject to a mortgage, under a fraudulent rent-charge instead of trying the question of fraud in an action at law. *Henley's Adm'r v. Perkins et als.*, 6 Grat. 615.

63. A bill having been filed by a mortgagee claiming slaves and the court having at the instance of the defendant and without any objection to the jurisdiction, taken possession of the slaves and directed them to be sold and having since held and controlled the proceeds, it is too late for the defendant to make the objection to the jurisdiction. *Ibid.*

64. A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such a partnership, whether for profits, losses, expenses, contributions or reimbursement. *Watson v. Fletcher*, 7 Grat. 1. *Fletcher v. Watson, id.*

65. Though the pleadings do not show that the transactions sought to be settled and adjusted, arose out of a partnership for gambling, yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the court to re-commit the accounts, and direct an inquiry into the consideration on which the claims of the parties are founded. *Ibid.*

66. Where an administrator with the will annexed, resorts to equity to establish and enforce claims against his testator's estate, and to set aside conveyances made by him, he places his whole trust and authority under the control of the court, and he will be restrained by injunction from pro-



ceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee and the legatee. *Ibid.*

67. A case in which a vendor being entitled to relief on account of a fraudulent concealment of facts by the purchaser, under the circumstances compensation, and not a rescission of the contract, was the mode of relief administered. *Armstead v. Hundley*, 7 Grat. 52.

68. Equity will relieve against a compromise entered into by a party, in ignorance of important facts connected therewith. *Ross' Ex'or v. McLaughlan's Adm'r et als.*, 7 Grat. 86. *Same v. Haden's Adm'r, id.*

69. In such case the party having paid more than he was originally bound to pay, may recover back the excess, with interest from the time of payment. *Ibid.*

70. A party who comes into a court of equity to enforce an equitable claim, must do so, within a reasonable time; and he must not delay until by his negligence there can no longer be a fair determination of the controversy, and his adversary is exposed to danger of injustice from the loss of evidence and information and means of recourse against others, occasioned by deaths, insolvencies and other circumstances. *Smith et als. v. Thompson's Adm'r et als.*, 7 Grat. 112.

71. The application of this equitable doctrine is for the sound discretion of the court and does not require the conviction of the court against the original justice of the claim or any other specific ground of defence; but its belief that under the circumstances of the case, it is too late to ascertain the merits of the controversy. *Ibid.*

72. A mistake in respect to the title of land is no ground for relief to a purchaser, where he purchased the land without agreement express or implied, for a conveyance with warranty of title. *Sutton v. Sutton*, 7 Grat. 234.

73. A court of equity in Virginia may subject heirs living here upon the covenants of the ancestor to the extent of the value of land descended to them in another state. *Dickinson v. Hoomes' adm'r et als.* 8 Grat. 353.

74. Under the circumstances of the case, the heirs held bound to account for only so much of the lands out of the state, as they have actually gotten or may get possession of, with the rents and profits thereof, after deducting the cost and expense of recovering the lands. *Ibid.*

75. A party coming into equity to enjoin a sale under a usurious deed of trust, though he does not ask a discovery, is only entitled to relief, to the extent of the usurious premium. *Bell et als v. Calhoun.* 8 Grat. 22.

76. A deed of trust to secure creditors requires them to signify their acceptance of it, by signing it within thirty days and to release the debtor.

The creditors being dissatisfied with its provisions, it is agreed between them and the debtor that they will not sign it; but two of them, who had entered into this agreement, sign the deed the day before the thirty days expire, with the avowed purpose that it is for the benefit of all. Afterwards one of them comes into equity to enforce the deed for the benefit of himself and the other, who signed, a court of equity will not entertain his bill. *Phippin v. Durham et als.* 8 Grat. 457.

77. A principal executes a bond, binding his heirs, to his security as endorser, with condition that he will, when required by the Bank or the surety pay off the notes and so indemnify and hold the security harmless and he dies leaving the notes not yet due and they are protested and afterwards paid by his administrator. \*The surety being entitled to resort to both the real and personal estate and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled to the extent of the amount of the notes so paid, if they do not exceed the penalty of the bond. *Cralle et als. v. Meem et als.* 8 Grat. 496.

78. Upon a bill by simple contract creditors to marshal assets, it is competent for the court, in its discretion to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts; but it is premature to order a sale before adjudicating the claims of the creditors and so ascertaining the amount of the indebtedness chargeable upon the lands of the decedent. *Ibid.*

79. Though such a decree for the sale of land has been prematurely made, yet if the sale is made and confirmed, the court will not set aside the sale on the petition of the purchasers, if, upon the hearing it appears that the sale is beneficial to the infants. *Ibid.*

80. The court having made a decree for a sale of real estate, on the petition of the adult heirs, and with the assent of the creditors, it is erroneous to proceed to sequester the rents of the other real estate, in the hands of the heirs, for the payment of the debts, before deciding upon the claim of the purchasers to have the sale set aside. *Ibid.*

81. A judgment creditor comes into equity to set aside a deed of trust as usurious. He fails to set aside the deed, but the court having possession of the cause, will decree the sale of the land, and the application of the proceeds according to the priorities of the parties. *Martin v. Hall et als.* 9 Grat. 8.

82. An injunction to a judgment at law, dissolved, as improvidently granted, without answer, though the bill charges that the judgment was recorded without appearance or defence for money which the plaintiff in the judgment alleged, he had paid as surety; though he had not in fact paid one cent of the money, but the same had been in fact paid by another surety, against whom there was a joint judgment with the plaintiff at law;

and that of this the defendant at law and the plaintiff in the bill for injunction had no knowledge until after the judgment and therefore did not make his defence at law. *Slack v. Wood.* 9 Grat. 40.

83. In an injunction to a judgment at law against the assignor and assignee, the plaintiff not being entitled to enjoin against the assignee, but entitled to have payment against the assignor, is not entitled to a decree against him for payment, but upon the terms of releasing him from his liability as assignor. *Drake v. Lyons.* 9. Grat. 54.

84. Upon a *scire facias* against bail, he surrenders his principal and gives notice thereof to the attorney of the plaintiff, the plaintiff not living in the county, but there is an office judgment against the bail, and he not defending it, it is confirmed. Equity will not relieve. *Allen Walton & Co., v. Hamilton.* 9 Grat. 255.

85. In an action at law, the defendant is prevented by unavoidable accident, from making defence, and setting up offsets which he held against the plaintiff, these offsets being no way connected with the debt sued upon, he has, however a plain remedy at law, or in equity for the recovery of his claims. He is not entitled to enjoin the judgment and set up his offsets against it, but must pursue his remedy for their recovery. *Hudson v. Kline.* 9. Grat. 379.

86. A bill for specific execution of a contract between adjoining owners, to keep open a lane through their lands, filed nearly twenty years after their contract, against a purchaser under one of the parties, without actual notice, and even doubtful constructive notice, the lane having been closed for a number of years, and the plaintiff having stood by, without setting up any claim to the lane when the land was twice sold, and having little or no interest in it, is dismissed. *McCue v. Ralston.* 9 Grat. 430.

87. A creditor at large may maintain a suit in equity to set aside a fraudulent deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the Commonwealth. *Peay v. Morrison's ex'ors.* 10 Grat. 149.

88. In a controversy between parties claiming a judgment lien and others claiming under a deed of trust, it being uncertain what part of the lands of the debtor are included in the deed of trust, it is error to decree a sale of the lands, until the priorities of the parties are adjusted, and it is ascertained what portions of the land are included in the deed. *Buchanan v. Clark, et als.* 10 Grat. 164.

89. There being two judgments having preference of the deed, the proceeds of the other moiety of the land, should be applied to satisfy the second judgment. *Ibid.*

90. Though lands are conveyed in trust to secure debts, a judgment credi-

tor having priority to the deed is entitled to subject but a moiety of the debtor's land to the satisfaction of his judgment, except in the case of a mere equity of redemption. *Ibid.*

91. The court having decreed the sale of the whole land, and it having been purchased by a party claiming under the deed of trust; and the final decree being in his favor, and a conveyance to him being directed; upon appeal by the party claiming under the judgment the decree is reversed. The claim of the purchaser must fall with the reversal of the decree; the purchaser not being a stranger to the controversy, purchasing at a judicial sale, but the party chiefly benefitted by the decree complained of. *Ibid.*

92. The next of kin of an intestate, being his mother and his widow, and the husband of the mother being in possession of slaves which he had, many years before, conveyed to the intestate, claiming to hold them for the life of himself and his wife; and the administrator having paid all the debts of his intestate, and declining to sue for the slaves, the widow may sue in equity for distribution of the slaves. *Roberts v. King*, 10 Grat. 184.

93. B., for himself and others sells part of a tract of land to J., who executes to B. his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their whole interest in the tract to J. B. having recovered judgments upon the bonds, J. is entitled to have the judgments enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B. to procure the other parties to execute the contract. *Joynes et als. v. Brock*, 10 Grat. 211.

94. Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards, other creditors sue out attachments at law against the same garnishee, as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments, and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale. *Moore et als. v. Holt*, 10 Grat. 284.

95. A party claiming that he has not been credited for all the money paid by him to the sheriff, on an execution, may have any injustice done to him in that respect, corrected by the court from which the execution issued. And it is not a case for an injunction and relief in equity. *Morrison v. Speer*, 10 Grat. 228.

96. Though the owner of lands has the legal title and might maintain trespass for an injury done to it, by raising iron ore upon it, yet equity has jurisdiction to enjoin another party who claims the land from taking the ore from it. *Anderson v. Harvey's heirs*, 10 Grat. 386.

97. Testatrix devises and bequeaths a small farm, slaves, &c., to a trust-

tee for the life of H., remainder to the children of H., living at her death. The trustee is directed so to conduct the farm, &c., as to be most advantageous to H. and her children during her life. There are five children and the husband of H. is dead. H. becomes indebted, judgments are recovered against her and she is discharged as an insolvent debtor; and then her creditors file a bill to subject her interest in the property to the payment of their debts. No surplus of the annual products, after the support of H. and her family is alleged or shown to exist. The bill is properly dismissed. *Nickell and Miller v. Handley et als.*, 10 Grat. 336.

98. If any such surplus product exist now or hereafter, the plaintiffs may hereafter file a bill to subject it, notwithstanding the dismissal of the first bill. *Ibid.*

99. When there are several purchasers of land subject to a judgment lien, some of them may file a bill to question the lien, or if it be valid, asking that the purchasers may be subjected to pay it. And though they ask for a ratable contribution, this will not prevent the courts subjecting the land last sold to satisfy the creditor. *Michaux' adm'r v. Brown et als.*, 10 Grat. 612.

100. *Quære*: whether a party may set up in a second suit pretensions inconsistent with the allegations of his bill and his pretensions in his first suit. *Frazer's adm'r v. Beville et als.*, 11 Grat. 9.

101. W. administrator of G. assigns the bonds of T. to the executors of H. in discharge of a debt due from G. to H. The executors sue T. and recover judgment and he enjoins it on the ground that G. owed him for a legacy left him by R. of whom G. was the executor; and the injunction is perpetuated. The executors of H. are entitled to the rights of T. against G.'s estate and are not confined to their remedy on the assignment of W. *Braxton's adm'r, &c. v. Harrison's ex'ors.* 11 Grat. 30.

102. In this injunction suit the executors of H. and W. and the administrator *de bonis non* of G. are parties and the decree perpetuating the injunction is by consent; and they also consent to a decree directing an account of G.'s estate, by his administrator. Held:

1st. That it is a case in which there may be a decree between co-defendants, in favor of the executors of H. against G.'s estate.

2nd. That to ascertain whether there were assets of G.'s estate to pay the debt, the account might be directed.

3rd. If the decree against G.'s estate was doubtful, the consent of the representatives of W. and G. clearly authorized it. *Ibid.*

103. Ten years after the decree, the second administrator *de bonis non* of G. entered into a contract, under seal, to pay the debt, out of the assets, when received; and the executors of H. agreed to wait one year, to release

their costs in the suit and dismiss it as to them : but the administrator was not to be bound personally, and the executors were at liberty, if the money was not paid in the year, to cancel the agreement and proceed to enforce any of their existing remedies. The administrator did not collect assets within the year and the executors sued in equity upon the agreement. Held :

1st. Though the right of the executor of H. to proceed against G.'s estate accrued when the injunction was perpetuated, yet the pendency of that suit carried on for their benefit, prevented the running of the statute of limitations against them.

2nd. Though it is generally true that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, on which a suit may be maintained.

3rd. That there was a sufficient consideration to sustain the agreement and a suit could be maintained on it by the executors of H. against the administrator, for payment out of the assets.

4th. That it was proper to sue in equity to have an account of, or for marshalling, the assets; and this especially as the agreement being under seal, it is doubtful whether an action could be maintained upon it. *Ibid.*

104. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust is executed, was held under the circumstances, to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust, at the suit of the executors of the uncle. *Fitzhugh's ex'ors v. Fitzhugh*, 11 Grat. 210.

105. Courts of equity will not, in general, assume the exercise of a discretionary power vested in a trustee; nor interfere to control a trustee acting *bona fide* in the exercise of his discretion; nor will a suit be entertained to compel a trustee to exercise his power. *Cochran v. Paris et als.*, 11 Grat. 343.

106. Testator gives his estate to his executors for the benefit of his son, and if they should judge that it would be prudent to invest him with it, to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate, equity will compel them to turn it over to him. *Ibid.*

107. Real estate is conveyed in trust to secure debts; the grantor in the deed has only the equitable title, but is entitled to have the legal title. The trustee sells, without getting the legal title for about one fourth the value of the property, to the principal creditor under the deed. The grantor, absent at the time, forwards the money to pay the debts secured to his agent at the place of sale, the letter is at the post office at and before the time of sale, but not delivered to the agent, though, in expectation of receiving it he had several times applied for it at the office. A court of equity will set aside the sale. *Rosset v. Fisher et als.*, 11 Grat. 492.

108. A defendant in an execution files a bill to enjoin an execution on the ground that a previous execution, sued out on the same judgment had been levied on the property of another defendant in the execution sufficient to discharge it. In such a case the bill must be filed in the county in which the judgment was recovered, and the circuit court of another county has no jurisdiction of the case. *Beckley v. Palmer et al.*, 11 Grat. 625.

109. If in such a case, the plaintiff insists that the sheriff has misapplied the proceeds of the property levied on, or that a payment has been made to him, which has not been credited on the execution, if he had an opportunity to apply to the court of law, from which the execution issued, for redress, he has no right to come into a court of equity for relief. *Ibid.*

110. Courts of equity have jurisdiction in all cases, to compel the executor to deliver a specific legacy. *Nelson's Adm'r v. Cromwell.* 11 Grat. 734.

111. A court of equity in Virginia may hold an administrator, who qualified as administrator, in the State of Mississippi to account for his administration in Virginia. *Powell v. Stratton et als.* 11 Gratt. 792.

---

## EQUITY OF REDEMPTION.

A judgment is a lien upon an equity of redemption in land and will be preferred to a subsequent purchaser of the equity of redemption, not having the legal title; and the lien extends to the whole of the equity of redemption. *Michaux' Adm'r v. Brown et als.* 10 Gratt. 612.

---

## ERROR.

See APPEALS.

---

## ESCAPE.

1. Under the act 1 Rev. Code of 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a wilful or negligent escape. *Stone v. Nelson*, 10 Gratt. 529.

2. In order to maintain the action, it is only necessary for the plaintiff to show the escape, which may be done by evidence *aliunde* the return on the execution. And to defeat the action, the sheriff must show that the escape was fortuitous and that fresh pursuit was made. *Ibid.*

3. Upon proof of the escape, the jury are bound to presume all that is necessary under the statute to be found in the verdict, unless the sheriff negative, by his proofs, all consent or negligence on his part, and also shows that he has used due means to retake the prisoner. *Ibid.*

4. Under the act 1 Rev. Code of 1819 chap. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape :

1st. Where the return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution and the plaintiff can show the escape *aliunde*.

2d. Where the return shows such a state of facts, as would entitle the plaintiff to a verdict in an action of debt for an escape. *Ibid.*

5. Upon such a motion, the court occupies the place of the jury as to the facts and is bound, upon a return of "executed" and proof of an escape, to presume that it was with the consent of the sheriff, unless he (the sheriff) proves that it was without his consent or negligence, and that he had used due means to retake the prisoner. *Ibid.*

6. The fact that the county court has not provided a jail, in which a debtor, taken in execution, may be confined, does not authorize the sheriff, who has taken a debtor in execution, to permit him to go at large. If no jail is provided by the county court, it is the sheriff's duty to provide one to keep the debtor, whom he has taken in execution—in custody. *Ibid.*

7. A return by a sheriff that the county court had not provided a jail and that he had therefore permitted a debtor, taken in execution, to go at large, of itself, shows an escape and will sustain a motion against a sheriff. *Ibid.*

---

### ESTIMATED HEIRS.

1. A fiduciary, whose duty it is, to hire out slaves for the benefit of *cestui's que trust*, will be held to account for interest on their estimated hires. *Cross' curatrix v. Cross' legatees*. 4th Gratt. 257.

2. Persons not holding slaves as fiduciaries, are not to account for interest on estimated hires of slaves. *Ibid.*

---

### ESTOPPEL.

1. H. sells his claim to a tract of land and warrants the title to the land, as it was in his grantor, but disclaims warranting that the title is good.



He is not estopped by his deed from setting up another adversary title to said land, purchased by him, against his vendee. *Wynn v. Harman's devisees*, 5 Grat. 157.

2. A certificate of a clerk, endorsed on a deed, that it was exhibited in his office, acknowledged and admitted to record, is conclusive of the fact and is not open to contradiction. *Carper et als. v. McDowell*, 5 Grat. 212.

3. A defendant relies on an inquisition and judgment authorizing a dam, as the grounds of his defence; he is estopped from denying the ownership of the land by the applicant for the mill. *Calhoun v. Palmer*, 8 Grat. 88.

4. In an action upon a bond given by a deputy sheriff and his sureties, in which they are all recited to be deputies; those who are thus recited are estopped from denying the fact. *Cox et als. v. Thomas adm'x.*, 9 Grat. 312.

5. The bond reciting that the plaintiff was high sheriff and one of the defendants was deputy, the obligors are estopped from denying these facts. *Ibid.*

6. A county court having laid the county levy and directed the sheriff to pay certain claims upon the county, out of it, and the sheriff having received the commissioner's books and proceeded to collect the levy, as far as it could be collected, and returned a list of insolvents. Upon motion by one of the creditors of the county, whose claim was directed to be paid out of the levy against the sheriff and his sureties, to recover the amount, it is not competent for the defendants to object that the county court was not legally constituted to be authorized to lay the levy, when it was done; nor can they object that the commissioner's books were irregularly made out and not properly authenticated. *Cook, sheriff et als. v. Hays*, 9 Grat. 142.

7. The sureties of a deputy in his bond to the high sheriff, for the faithful discharge of his duties, are estopped from denying that their principal was deputy, unless the bond was invalid. *Cecil v. Early et als.*, 10 Grat. 198.

8. Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea and the plaintiff replies specially, and relies on the facts stated in his replication and especially on the bond of the deputy and his sureties, as an estoppel. Though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel, a demurrer to the replication should not be sustained. *Ibid.*

9. N. living in Virginia, brought two suits in South Carolina; and B. being there, became his security for costs. N. executed to B. a bond with sureties living in Virginia to indemnify him. In an action by B. against N. and his sureties, the records of the suits brought by N. in South Carolina were offered in evidence by B. and were objected to, on the ground that they showed that B. had not become the surety of N. at the date of the bond of N. and his sureties to him. *Held*: That the defendants not showing that B. was the surety of

N. for costs in other cases, their bond must be held to refer to these suits; and they were estopped by their bond from denying that B. was the surety of N. at the time of its execution. *Cordle v. Burch*, 10 Grat. 480.

---

### EVICTION.

In a suit, in which the tenant is not a party, but the lessee is, a decree is made, directing the sheriff to rent out the demised premises. The premises are rented out, and the tenant yields possession. As the decree did not direct the sheriff to evict the tenant, and there was no paramount title, under which the lessee might have been evicted, his surrender of the possession was not an eviction, so as to release him from the payment of the rent. *Murray, Caldwell & Co. v. Pennington*, 3 Grat. 91.

---

### EVIDENCE.

1. WHAT IS EVIDENCE.
2. WHAT IS NOT EVIDENCE.
3. OTHER PRINCIPLES.

#### 1. WHAT IS EVIDENCE.

1. A bill in equity by a Bank, sworn to by its cashier, is competent evidence against the Bank, in a subsequent suit between the same parties. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. On the trial of a writ of right, preparatory to the proof of entry on the land by an agent, a power of attorney from demandants to the agent, duly authenticated and giving him authority over the land, is proper evidence. *Taylor's devisees v. Burnsides*, 1 Grat. 165.

3. An office copy of a will admitted to probat by the proper court, upon improper proof, cannot be objected to as evidence, on that ground. *Ibid.*

4. Calls and descriptions of a survey, made by the same surveyor, about the same time, with the survey of the land in dispute, may be given in evidence. *Overton's heirs v. Davidson*, 1 Grat. 211.

5. Declarations by a surveyor or chain-carrier, or other persons present at a survey, of the acts done by or under the authority of the surveyor, in making the survey, if not made, *post litem motam*, and the person who made them is dead, are admissible in evidence. *Ibid.*

6. Declaration in debt on an indemnifying bond, alleges that the defendants bound themselves to pay to any person, claiming title to the property, all damages, &c. The bond offered is in a penalty and with a condition. *Held*: No variance and admissible evidence. *Kewan v. Branch*, 1 Grat. 274.

7. A copy of an account from the partnership books, being filed with the answer of the executor of one of the partners, and being treated as evidence on the hearing in the court below, will be so considered in the Court of Appeals. *Kyle's ex'or v. Kyle*, 1 Grat. 526.

8. On the question whether goods were sold by the plaintiffs to the defendants, or a third person, the original entries on the plaintiffs' books, charging them to the defendant, are admissible evidence for the plaintiffs. *Downer & Co. v. Morrison*, 2 Grat. 250.

9. A letter of plaintiffs to defendants, filed by defendants and read by them on a former trial, is competent evidence for plaintiffs. *Ibid.*

10. The affidavit of a notary, made under the Act 28th January, 1829; Sup. Rev. Code 259, and the 3rd February, 1834, Sessions Acts 75, is only evidence of the truth of the facts stated in the protest. *Walker v. Turner*, 2 Grat. 534.

11. A deed is acknowledged before justices, by the grantor, who retains possession of it. It depends upon the intention of the grantor at the time, whether the acknowledgment is a complete execution of the deed. *Hutchinson and wife v. Rust et als.*, 2 Grat. 394.

12. In such a case the intention of the grantor may be ascertained by evidence of his previously declared purpose, though nothing is said at the time of the acknowledgment to indicate his purpose. *Ibid.*

13. Parol testimony is admissible to shew that a scroll was put upon an appointment in writing, in the nature of a will, by the direction of a testatrix, as a seal. *Pollock and wife v. Glassel*, 2 Grat. 439.

14. On a trial for murder, the dying declarations of the deceased, if made in expectation of death, are competent evidence against the prisoner. *Hill's case*. 2 Grat. 594.

15. *Quære*: Whether upon a trial for murder, the declarations of the deceased, made immediately after the wound was inflicted, and before he had time to fabricate a story, and when the *lis mota* did not exist, may not be given in evidence as part of the *res gestae*. *Ibid.*

16. The endorsement of the clerk, on the deed, of the time it was left for recordation, is *prima facie*, but not conclusive evidence of the time. *Horsley et als. v. Garth et als.*, 2 Grat. 471.

17. A decree *in personam* against an absent debtor, merges the original cause of action, so far as to enable the plaintiff to rely thereon, in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes, and to repel the statute of limitations, except so far as the statute applies to judgments and decrees. *Rootes' ex'x v. Tompkins' trustees*, 3 Grat. 98.

18. The receipt of a constable for a debt, claim or execution, is evidence against the constable and his sureties, that the debt, &c., has come to his hands, though such receipt does not purport to be given in his official character. *M'Neale et als. v. Governor for Clarke*, 3 Grat. 299.

19. If such receipt purports on its face to have been given by the constable in his official character, and six months have elapsed from the date thereof before the commencement of the action, such a receipt is *prima facie* evidence of the receipt of the money by the constable, when the debt, claim or execution was placed in his hands to be warranted for and was such as might have been recovered by warrant. *Ibid.*

20. If such receipt of a constable in his official character is for a debt or other claim than an execution, it will be intended, unless the contrary appears, that it was placed in the hands of the constable to be warranted for, and that it might have been recovered by warrant; but the contrary is the intendment in the case of an execution. *Ibid.*

21. If the receipt of the constable does not shew who was the plaintiff in the execution, or in the case of any other debt, who was the creditor entitled to maintain an action in his own name, it should be intended that the person to whom the receipt was given was the plaintiff in the execution, or the creditor who could maintain the action in his own name, unless the contrary is shewn by proper evidence. *Ibid.*

22. An answer not denying a charge in a bill, and a copy of a decree in a previous case, being filed as proof of the charge and not objected to, the decree is *prima facie* evidence. *Roberts v. Colvin*, 3 Grat. 358.

23. A prisoner is charged with breaking open a house in the day-time and stealing therefrom coins of a particular denomination. Upon this indictment, proof that the prisoner had in his possession a coin of a different denomination from those described, which was in the house when it was broken, is admissible evidence to bring home the breaking of the house to the prisoner. *Hall's case*.

24. Upon an indictment for selling spirituous liquors without a license, the commonwealth may prove any offence against the act by the defendant, within the prescribed time. *Loftus' case*, 3 Grat. 631.

25. Interest is paid on a bond in advance for three years, and this is stated in the bond; but paid in land at a price fixed in reference to the annual interest for three years, is not usurious and the plaintiff may prove the facts on the trial. *Porterfield v. Coiner*, 4 Grat. 55.

26. To repel the usurious intent, the plaintiff may shew the value of the land at the time of the contract. *Ibid.*

27. The previous statements of a witness may be given in evidence, whether written or oral, to impeach his credibility; but not as evidence of any fact touching the issue to be tried. *Charlton v. Unis*, 4 Grat. 58.

28. A deed acknowledged and proved before a county court, which conveys land in another county, and thereupon ordered to be certified to the court of that county, is on that certificate recorded in the general court; a copy of the deed from the clerk's office of that court, is competent evidence. *Pollard's heirs v. Lively*, 4 Grat. 73.

29. Copies of surveys of waste and unappropriated land, and of patents, from the register's office, are competent evidence in the place of the originals. *Ibid.*

30. Upon a question of the identity of the patentee with the ancestor of the demandants in a writ of right, the survey on which the patent issued, and the assignments thereon and the surveys and patents for land in the neighborhood of the land in controversy, may be competent evidence for the tenant to disprove the identity. *Ibid.*

31. On a warranty of soundness of an animal, it is for the jury to say, what is embraced therein; and on that question the qualities and uses for which the animal is purchased and sold, may be referred to, as explaining what was intended to be included in the warranty. *Thornton v. Tompkins et als.*, 4 Grat. 121.

32. A conveyance is made of land by a sheriff, when by law he had authority to sell, which recites facts, that if true, would show that the sale was legal; the purchaser hold for many years, without claim by those whose title the sheriff sold; the legal presumption is that the sheriff had authority to sell, and as against strangers setting up an adverse title, the recital in the deed as to the sheriff's authority to sell are to be taken as true. *Robinett v. Preston's heirs*, 4 Grat. 141.

33. The account of sales rendered by a consignee to his consignor, though objected to when presented, is *prima facie* evidence of its own correctness. *Mertons v. Nottlebohms*, 4 Grat. 163.

34. An attempt of a prisoner to escape from custody, or his offer of a bribe to the officer, to permit him to escape, may be given in evidence against him, though the attempt and offer were made, when he was in custody, on a different charge from that for which he was tried; both charges being founded on the same fact. *Dean's case*, 4 Grat. 541.

35. To authorize the admission of an old deed in evidence, without proof of its execution, there must be proof of possession according to and under the deed; and proof of a possession commencing fifteen years after the date of the deed and not until a conveyance by the grantee in the old deed is insufficient. *Shanks et als. v. Lancaster*, 5 Grat. 110.

36. The party claiming under the old deed, offering parol proof of possession the other party is entitled to offer such proof to rebut that offered to prove possession. *Ibid.*

37. The record of a suit by heirs for division of the lands of their ancestor, shews that there had been a decree, appointing commissioners to lay off and assign to the heirs respectively their shares of land; that the commissioners had executed the decree, and made a report, accompanied with a plat of the division, which report and plat were ordered to be recorded. This is admissible evidence that partition had been made, by the final decree of the court among said heirs. *Ibid.*

38. A tenant in ejectment, claiming under a junior patent, founded on an inclusive survey, may, in order to show possession under color of title prior to his patent, introduce in evidence, the entries for the different tracts, embraced in the inclusive survey, the order of court, authorizing the survey and the survey itself. *Ibid.*

39. A decree of partition being a necessary link in a chain of title, if the decree sufficiently designates the land referred to in it, it is competent evidence, without the production of the whole record. *Wynn v. Harman's devisees*, 5 Grat. 157.

40. A copy of a will, which has been admitted to probat, certified by the clerk, is competent testimony in place of the original. *Ibid.*

41. A copy of a decree, certified by the clerk is competent evidence. *Ibid.*

42. Plaintiff in order to show error in a settlement with the defendant, may prove that the account by which the settlement was made, was erroneously copied from his books, and for this purpose may shew that the items in the ledger correspond with the original entries and that there is a credit in the account, which is not in the books. *Hampton, Smith & Co. v. Michael*, 6 Grat. 151.

43. It is no objection to the competency of a witness that he heard the other witnesses examined, though he had been ordered to leave the room during their examination. *Hopper, Steirs and Lemmon's case*, 6 Grat 684.

44. A trust deed stating the amount of the different debts secured, is evidence, but not conclusive as to the amount of a debt, even against the grantor or his administrator. *Griffin's ex'or et als. v. Macaulay's adm'r*, 7 Grat. 476.

45. Under the circumstances the books of the grantor in the deed of trust were proper evidence of the amount of the debts due to the creditors secured by the deed. *Ibid.*

46. Under the circumstances the answer of the assignor of a debt held to be competent evidence against his volunteer assignee, in controversy between the assignee and third persons. *Ibid.*

47. The organization of a corporation may be proved by its records and

parol proof, without the production of its list of subscribers. *Crump v. United States Mining Company*, 7 Grat. 352.

48. Upon a writ of unlawful detainer, defendant sets up title in himself. Plaintiff may prove that defendant entered on the premises under a parol lease from himself, though the lease was proved to continue more than a year. *Adams v. Martin*, 8 Grat. 107.

49. In a case of probat, a witness unable to attend the court, is examined as to the handwriting of a testamentary paper which had been shewn to him by the propounder of the will, but which was not before him when he gave his deposition. The testimony is admissible, its weight depending upon the certainty of the proof that the paper propounded for probat, is the paper that was shewn to the witness. *Nuckols adm'r v. Jones*, 8 Grat. 267.

50. Upon a motion by a prisoner to be discharged, for the failure to try him within three terms, the commonwealth relies on the fact that he was tried and convicted and the verdict set aside for a variance; the record of the court is competent, and the only competent evidence of these facts. *Adcock's case*, 8 Grat. 661.

51. Where the question is, whether a promissory note is signed as principal or agent, and that is doubtful on its face, parol evidence is admissible to prove the note was intended to be signed as principal. *Early v. Wilkinson & Hunt*, 9 Grat. 68.

52. Proof of the admissions of the maker of the note, as to another note executed in the same way, except as to brackets around the second name on the note, is admissible to confirm the evidence arising from the face of the note. *Ibid.*

53. An original deed having been authenticated for record, in the manner prescribed by law at the time of its execution, is admissible as evidence, without further proof of its execution, though it has not been duly recorded. *Hasler's lessee v. King*, 9 Grat. 115.

54. In a suit for partition, both parties derive title under a deed recorded in the county of H., but not in the county where the land lies; the recitals in the subsequent conveyances direct attention to that deed. These recitals are evidence against the parties and privies in blood, in estate and in law, and an office copy of the said deed from the place described as the place of record, is competent evidence in controversies with them. *Hannon et als. v. Hannah*, 9 Grat. 146.

55. R. assigns the bond of G. to K., to enable K. to purchase goods on the credit of the assignment, and K. purchases goods of H. on the credit thereof. In an action by H. against R. on the assignment, the statements of K. to H. in relation to said assignment, pending the negotiation for the goods and the transfer of the bond of G. are competent evidence against R.

But the statements of K., made subsequently, are not. *Hopkins, Brother & Co. v. Richardson*, 9 Grat. 485.

56. Declaration made by R., during the consultations and conversations in relation to the assignment of the bond of G. to K., though made a day or two before the bond was assigned, are competent evidence for R. as a part of the *res gestae*, to shew that he did not make the assignment under such circumstances or with such intent, as would render him liable upon the assignment to the holder of the bond. *Ibid.*

57. In an action upon a promissory note, purporting to be made in the name of a partnership, unless the defendants file an affidavit under the statute, they will not be allowed to prove that the partnership was dissolved by the death of one of the partners before the note was made. *Phaup &c. v. Stratton*, 9 Grat. 615.

58. The payments and set-offs relied on by a defendant, were for the most part transacted through a brother of the plaintiff's intestate, so that it becomes necessary to prove the agency of the brother. The defendant, after introducing evidence tending to prove the agency, offer in evidence, as corroborating the previous evidence of agency, the record of a suit instituted by the defendant's intestate, which was settled by the brother, and the suit thereupon dismissed, to which objection was never made by the plaintiff's intestate. *Held*: The record is competent evidence for the purpose for which it is offered. *Perkins' adm'r v. Hawkins' adm'r*, 9 Grat. 649.

59. The bond sued upon was executed in 1813; and the intestate of the plaintiff having died in 1816, his brother qualified as one of his administrators. In order to sustain the presumption of payment from lapse of time and other circumstances, the defendant offered in evidence a deed by which he conveyed to the brother, whilst he acted as administrator, a lot of land for the price of \$3205. *Held*: That it was competent evidence. *Ibid.*

60. Proof being offered, tending to prove an agency, a paper signed by such person, shewing he had settled the price of certain hogsheds of tobacco with defendant's intestate, for plaintiff's intestate, is competent evidence of sett-off. *Ibid.*

61. A paper consisting of figures, with a receipt attached to it, accompanied by evidence explaining what was meant by the figures, is competent evidence. *Ibid.*

62. A record of another suit between the same parties, in which the same causes of action were in controversy, and the finding of the jury was against them, is competent evidence. *Johnson's ex'x v. Jennings' adm'r*, 10 Grat. 1.

63. An endorsement on a bond, being equivocal in its character, all the circumstances attending the transaction, the contemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be



looked to, to ascertain what kind of instrument was within their contemplation and design. *Smith's ex'or v. Spiller*, 10 Grat. 318.

64. If the deed of a sheriff conveying land is defective, it is still competent evidence to show, with other evidence an actual entry with claim of title and continued holding thereunder, so as to make out a title or right of entry by actual possession. *Flannegan v. Grimmer et als.*, 10 Grat. 421.

65. In ejectment, plaintiff claims under a deed from the commissioner of delinquent lands; the record of the proceedings, including the exhibits, in which the sale and conveyance of the land was directed, is competent evidence, though there be irregularities in the proceedings, apparent on the face of the record. *Smith et als. v. Chapman*, 10 Grat. 445.

66. On a survey directed, in a cause, some of the lines are run, when one of the parties acts as chainman. Upon a second survey, another chainman is employed and all but one of the lines are run again. The line not run the surveyor says he ascertains to be correct by other lines run; and the line is submitted to the jury not as a line run, but as a protracted line. This is not error. *Ibid.*

67. Statements of a chainman, who is dead, as to the corner and line trees of a survey are properly admitted in evidence, but statements as to the locality of the land and the streams the lines would cross, are not admissible evidence to fix the locality of the survey. *Ibid.*

68. The question being whether a survey was actually made, so as to entitle the party claiming under the patent issued upon it to reverse the courses called for in the patent, it is competent for the other party to introduce the entry and survey, in which the courses are the same as in the patent, and five other large surveys, bearing the same date and made by the same surveyor, to disprove the actual running of the survey. *Ibid.*

69. In a trial for murder, in order to contradict a witness, it is competent to introduce in evidence a deposition given by him, before the inquest, taken down at the time by the coroner and read to the witness and signed by him. *Wormeley's case*, 10 Grat. 658.

70. On a trial for felony, a confession of the prisoner may be given in evidence, unless it appears that the confession was obtained from him by some inducement of a worldly or temporal character, in the nature of a threat or promise of benefit, held out to him in respect to his escape from the consequences of his offence or the mitigation of his punishment, by a person in authority or with the apparent sanction of such person. *Smith's case*, 10 Grat. 734.

71. A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such and in no way affected by the of-

fence, is not a person in authority in the sense of the rule which excludes confessions made to a person in authority. *Ibid.*

72. On a prosecution for uttering or attempting to employ as true, a forged note purporting to be the note of the bank of D. in Pennsylvania, a banking company, authorized by the laws of Pennsylvania, the existence of such bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania, is surplussage and need not be proved. *Cady's case*, 10 Grat. 776.

73. Upon a trial, the defendant introduces a bond upon which a receipt is endorsed, which receipt is attested by a witness. The receipt is evidence for the plaintiff, without his calling the witness to prove it. *B. Staton v. Pittman, sheriff*, 11 Grat. 99. *Pittman, sheriff v. B. Staton, Id.*

74. Parol evidence that the clerk of a drawee of a bill of exchange was authorized to refuse acceptance of a bill, is admissible in an action by the holder against the endorser. *Stainback v. The Bank of Virginia*, 11 Grat. 260.

75. In debt on a bond for money loaned, upon a plea of *non est factum*, defendant relies on the fact that the obligee did not have the means to lend the money; and to rebut this the plaintiff introduces evidence to shew that he had money as executor. The defendant may introduce the settlement made by the plaintiff of his accounts as executor, to shew he did not have the money from that source. *McDowell's ex'or v. Crawford*, 11 Grat. 377.

76. A certificate of the Secretary of the State of Ohio, that a statute certified, is correctly copied from the original rolls on file in his office, is a due authentication of the statute, according to the act of Congress. *Wilson v. Lazier et als.*, 11 Grat. 477.

77. Proof that when a deed was read, it was understood in a very material respect, as different from what it is, may tend to shew that it was misread, and therefore is competent evidence. But if the deed was correctly read, the misunderstanding of it, by a party, cannot affect its validity as a deed. *Harrison v. Middleton*, 11 Grat. 527.

78. In a writ of right or ejectment, the tenant may show the entry and survey on which his patent is founded, in order to show adversary possession under claim of title. *Koiner v. Rankin's heirs*, 11 Grat. 420.

79. Acts or declarations of a person who had been the agent in procuring a deed for another, made whilst the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to shew fraud. *Smith's adm'r v. Betty et als.*, 11 Grat. 752. *Same v. Herman et als.*, *Id.*

## 2. WHAT IS NOT EVIDENCE.

1. An authenticated copy of a deed, recorded in a county where none of the land, thereby conveyed, lies, is not competent evidence in place of the original. *Pollard's heirs v. Lively*, 2 Grat. 216.

2. The record of a suit between other plaintiffs and defendants, to which the present plaintiffs were neither parties nor privies, is not competent evidence against them. *Downer & Co. v. Morrison*, 2 Grat. 250.

3. Husband and wife convey the equity of redemption in the wife's land to a trustee, to be sold for the use and benefit of the grantors. They afterwards mortgage the same property and the wife dies. Parol evidence is not admissible against the mortgagee without notice, to prove that at the time of executing the deed, it was agreed between the parties thereto, that the trustee should hold the property in trust to secure debts due from and advancements made to the husband. *Siter, Price & Co. v. McClanachan et als.*, 2 Grat. 280.

4. If a protest under the act 28th Jan'y, 1829, Sup. R. C. p. 259, or the act 3d Feb'y, 1834, Sess. acts 75, does not state that notice of the dishonor of the note was given to the endorser, the affidavit of the notary stating that the notice was given is not competent testimony. *Walker v. Turner*, 2 Grat. 534.

5. Certificate of justices of the acknowledgment of a deed by the grantor is not conclusive evidence that execution of the deed is complete. *Hutchinson and wife v. Rust et als.*, 2 Grat. 394.

6. If the official receipt of the constable is given for an execution not in the name of the relator in the action, or for a debt or claim, for which the relator could not maintain a warrant in his own name, then the receipt is not admissible evidence to maintain the action of the relator. *McNeale et als. v. Governor for Clarke*, 3 Grat. 299.

7. A creditor requests his debtor to remit the amount due. This does not authorize evidence of local usage or understanding, to give a meaning to the terms of the letter different from that which they obviously bear. *Gross, Myers & Moore v. Criss*, 3 Grat. 262.

8. The previous statements of a witness having been given in evidence, the party giving them in evidence, cannot prove them untrue; but if allowed in evidence, the other party will not be authorized to prove the statements true. *Charlton v. Unis*, 4 Grat. 58.

9. In a suit for freedom, hearsay evidence that plaintiff was free, is not admissible to corroborate other witnesses, or for any other purpose. *Ibid.*

10. The fact that a witness has negro blood in his veins and is of negro descent, though not so near as to render him incompetent as a witness, is

not competent evidence to impeach his credibility, (three judges dissenting.) *Dean's case*, 4 Grat. 541.

11. The deed of the collector of the direct tax of the U. S., made under the act of Jan'y 9th, 1815, does not furnish *prima facie* evidence of the regularity of the collector's proceedings. *Jessee v. Preston*, 5 Grat. 120. *Keith v. same, Id.*

12. A party claiming title under a deed from the collector of the U. S. for land sold for the direct tax, must shew that everything was done, which the law required to be done, before making the sale. *Ibid.*

13. The deposition of the collector in general terms that the sale was made in exact pursuance of the act of Congress, without specifying what was done is not proper evidence of the fact. Evidence of the various proceedings required by law, before the sale was made, should be adduced to enable the court to determine, upon the facts proved whether the authority to sell was properly exercised in the particular case. *Ibid.*

14. A decree directing a conveyance of land by the marshal is not of itself competent evidence of the marshal's authority to convey the land embraced in the deed, unless it designates the land directed to be conveyed; but the whole record, or so much thereof as will shew the land intended by the decree, must be produced with it. *Masters v. Varner's ex'ors*, 5 Grat. 168.

15. The recitals in the deed of the marshal are no evidence of his authority to convey, as against an adverse claimant. *Ibid.*

16. The declarations of a deceased person as to his ownership of specific land are not competent evidence for a party claiming under his title. *Ibid.*

17. The recitals in a deed, though evidence against a grantor and all claiming under him, are not evidence against third parties, claiming not under but adverse to the deed. *Wiley et als. v. Gevins et als.*, 6 Grat. 277.

18. A witness on the trial of a white man, not allowed to state what was said by a free negro. *Hopper, Steirs and Lemmon's case*, 6 Grat. 684.

19. A record of a conviction of a witness in another State, for petty larceny, not competent evidence to impeach the veracity of the witness. *Uhl's et als. case*, 6 Grat. 706.

20. In an action of debt against an administrator, a paper signed by him in the lifetime of his intestate, referring to the bond sued on, not appearing to have been signed as agent of the intestate, is not competent evidence against the administrator as the admission of a party to the record. *Gains' adm'r v. Alexander*, 7 Grat. 257.

21. The paper not purporting to be executed as agent of the intestate, is

not of itself evidence of agency, so as to render it competent evidence. *Ibid.*

22. The confessions or admissions of an accomplice in a felony, after the commission and completion of an offence, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved. *Hunter's case*, 7 Grat. 641.

23. A record to which neither the demandants nor tenants were parties, is not even *prima facie* evidence against the tenant, that the grantor in the deed to the demandants was heir at law of the grantee in the patent under which the demandants claim title. *Duncan v. Helms et als.*, 8 Grat. 68.

24. The recitals in a deed of a commissioner of delinquent lands, are not evidence against a party claiming adversely to the deed. *Walton v. Hale*, 9 Grat. 194.

25. T. leases land to E. by deed, signed also by E. and E. holds over after the expiration of his term and then conveys a part of the leased premises to A. in fee simple. In a proceeding of unlawful detainer by T. against E. and A., they will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others, nor will they be permitted to introduce their title papers for the purpose of showing that they had not possession of the land claimed by T. *Emerick v. Tavener*, 9 Grat. 220.

26. In a writ of right, in the pleadings and verdict, the plaintiffs are described as the heirs of B., under whom they claim. This is not evidence that they are the heirs of B. in an appellate court. *Bell's heirs v. Snyder et als.*, 10 Grat. 350.

27. The report of the surveyor, in the cause, speaks of one of the parties as the heirs of B. This is not evidence that he is such heir. *Ibid.*

28. Statements of a chainman, who is dead, as to the locality of the land and the streams the lines would cross, are not admissible evidence to fix the locality of the survey. *Smith et als. v. Chapman*.

29. In an action for a *devastavit*, by a creditor against an executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid to a legatee. The executor proposed to show by parol proof that the legatee paid, was not a legatee of his testator, but of a person of whom his testator was executor, and that his testator had received sufficient assets to pay the legacy, but had not done it. *Held*: The fact of such a legacy and that the executor's testator was such executor, should be proved by the will and the record of his qualification; and parol evidence is inadmissible for that purpose. *Millers v. Callett*, 10 Grat. 477.

30. In detinue for slaves by a trustee, in a deed of trust against a defendant, who claims the slaves by purchase from the same grantor, the defendant offers a witness to prove the debt secured by the deed was paid by a sale of slaves to the creditor by the debtor. To this evidence the plaintiff objects and introduces a record in a chancery cause between the debtor and creditor, in which it has been decided that the price of these slaves has been, by agreement between the debtor and creditor, applied in part discharge of another debt. *Held*: The decree is conclusive and the defendant's evidence is inadmissible. *Nichols v. Campbell*, 10 Grat. 560.

31. In the same cause it was decided that there was no usury in the debt secured by the deed of trust. The decree concludes the defendant and he cannot set up usury in this cause. *Ibid*.

32. In a prosecution for rape it is not competent to give in evidence any particulars of the description of the person committing the rape, which may have been given by the woman. *Brogy's case*, 10 Grat. 722.

33. *A fortiori*, is it not competent if the woman when examined as a witness declines to give a description of the person committing the offence. *Ibid*.

34. A witness for the prisoner on a trial for felony who had given evidence at a former trial is absent from the commonwealth at the second trial. It is not competent for the prisoner to prove what the witness swore to on the first trial. *Ibid*.

35. In the case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land. *Jarratt v. Johnson*, 11 Grat. 327.

36. A note from the defendant to the plaintiff, delivered some days before the trial, authorizing the plaintiff to introduce his books as evidence, if he will allow them to be examined by the defendant's counsel previous to the trial, is not admissible evidence for the defendant, for any purpose. *McDowell's ex'or v. Crawford*, 11 Grat. 377.

37. An extract or copy from his field notes, taken by a surveyor is not evidence, and he can only use it to refresh his memory; he must then speak from his recollection. *Harrison v. Middleton*, 11 Grat. 537.

38. Declarations of a person who had been the agent in procuring a deed for another, made either before the negotiation for the deed commenced or after the execution of the deed was completed, are incompetent evidence against the grantee in a deed, to shew that provisions which were intended to be inserted in the deed had been fraudulently omitted. *Smith's adm'r v. Betty et als*. 11 Grat. 752. *Same v. Thurman et als. id*.

39. The declarations of a grantor in a voluntary deed, made after its execution are not competent evidence against the grantee, to show that provisions which were intended to be inserted in the deed had been fraudulently omitted. *Ibid*.

40. Nor are the declarations of the grantor made before the execution of the deed, competent evidence against the grantee, in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured. *Ibid.*

### 3. OTHER PRINCIPLES.

1. The court should not instruct the jury on the sufficiency of the evidence to maintain the issue. *McKinley &c. v. Ensell et als*, 2 Grat. 333.

2. The act 5th February, 1828, Sup. Rev. Code 265, dispensing with evidence of hand writing in certain cases, only applies where the declaration alleges that the defendant, or person stated to have made the writing, subscribed his name thereto. *Kelly v. Paul*, 3 Grat. 191. *Shephard & Co. v. Fry's id.* 442.

3. The act applies to instruments signed with the name of a partnership, but the question is still open, whether the persons sought to be charged are members of the firm. *Ibid.*

4. If the receipt of a constable in his official character is for a debt or claim other than an execution, it will be intended, unless the contrary appears, that it was placed in the hands of the constable to be warranted for and that it might have been recovered by warrant, but the contrary is the intendment in the case of an execution. *M'Neale et als v. Governor for Clarke*, 3 Grat. 299.

5. What facts are insufficient to establish a conspiracy between the prisoner and a third person to commit an offence, so as to let in the declarations of such third person as evidence against the prisoner, such declarations being made in the absence of the prisoner. *Williamson's case*, 4 Grat. 547.

6. An objection to decree of partition, which is a necessary link in a chain of title, on the ground that it had not been recorded in the country where the land lies, cannot be made, for the first time, in the court of appeals. *Wynn v. Harman's devisees*, 5. Grat. 157.

7. Where plaintiff comes into equity on the ground of discovery, the whole answer is to be read, if it is used at all as the testimony of a witness; and no part of it, pertinent to the discovery, is to be rejected because it is affirmative matter in avoidance of that which is admitted to be true. But though the answer is to be read, it is subject to be discredited in the same manner, as the testimony of any other witness. *Lyons v. Miller*, 6 Grat. 427.

8. What is sufficient knowledge of a prisoner to authorize a witness to testify as to his identity. See *Hopper, Steirs and Lemmon's case*, 6 Grat. 684.

9. Upon the examination of a witness called to impeach another, he cannot be asked what is the general character of the witness in relation to other matters, as well as to his veracity. *Uhl et als case*, 6 Grat. 706.

10. A party offering in evidence a deed purporting to be executed by a commissioner, under the decree of a court, and conveying land, must offer with it so much of the record of the cause, in which the decree was made, as will shew the authority of the commissioner to convey the land described in the deed. *Coles v. Miller et als*, 8 Grat. 6.

11. The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. *Ibid*.

12. A witness called to prove the hand writing of a paper offered for probat, may be impeached by proof of what she has said about that paper at another time. But neither her capacity to judge of the hand writing or her credit is to be impeached by what she may have said of some other paper. *Nuckol's Adm'r v. Jones*, 8 Grat. 267.

13. In an action of debt under the plea of payment, without a bill of particulars, the defendant may give in evidence, the parol admissions of the plaintiff, that but a certain part of the debt is due. *Rice's ex'or v. Annatt's adm'r*, 8 Grat. 557.

14. Upon a motion to exclude evidence, the party making the motion should specify the evidence to which he objects, and when the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality. *Friend v. Wilkinson & Hunt*, 9 Grat. 31.

15. If a note upon its face appears to be signed as principal, the admission of parol evidence, to prove it was so signed, is not error for which the judgment will be reversed, though such evidence is improper. *Early v. Wilkinson & Hunt*, 9 Grat. 68.

16. On a motion by administratrix of high sheriff against deputy and his sureties, for failure to pay over money made on execution, the whole record of the cause on the motion against her, is not necessary, but the judgment is sufficient; that and its recitals being *prima facie* evidences against the deputy and his sureties. *Cox et als v. Thomas' adm'r*, 9 Grat. 323.

17. In an action on a promissory note, the defendant will not be permitted to question the genuineness of the note or to show that it had been altered, after it was indorsed by him, without the affidavit required by the statute. *Archer v. Ward*, 9 Grat. 622.

18. A witness may refresh his memory by reference to a paper, whether an original or a copy and whether written by himself or another. But he must then speak from his own recollection thus refreshed. *Harrisson v. Middleton*, 11 Grat. 527.



19. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in Court, may refer to the courses and distances on the diagram, though he may not be able to remember them independent of it: The diagram is itself evidence, and he may point out on it the lines he ran. *Ibid.*

20. *Quære*: if the record of a suit by parties claiming the estate against executor is evidence against a specific legatee who was not a party. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

21. A cause is brought on to be heard upon the bill, answer, exhibits and awards. *Quære*: if the depositions and commissioners report are a part of the record, and evidence as such in a case, where such record is evidence. *Ibid.*

22. A certificate of the secretary of the state of Ohio under the great seal of the state, that a statute certified is correctly copied from the original rolls on file in his office, is a due authentication of the statute, according to the act of Congress. *Wilson v. Lazier et als.*, 11 Grat. 477.

23. A cause is brought on to be heard, upon the bill, answers, exhibits and award. *Quære*: if the depositions and commissioners report are a part of the record, and evidence as such, in a case, in which the record is evidence. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

24. *Quære*: if the record of a suit by parties claiming the estate against the executor, is evidence against a specific legatee, who was not a party. *Ibid.*

See APPEALS and WITNESS.

---

## EXAMINING COURTS.

An examining court has no right to sign a bill of exceptions to any opinion or act of the court; and if they do, it is no part of the record of the trial. *Souther's case*, 7 Grat. 673.

---

## EXCEPTIONS.

1. The court before which a cause has been tried, may, upon overruling a motion for a new trial, refuse to certify the evidence, or the facts, where the testimony is conflicting or depends upon the credibility of the witnesses. *Taliaferro v. Franklin*, 1 Grat. 332.

2. No exception having been taken to the rejection of a plea, offered by the defendant in the court below, the propriety of rejecting the plea cannot be considered by the appellate court. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

3. An exception to the admission of a deposition, as evidence, for an irregularity in taking it, must state the grounds of the objection; otherwise the appellate court will not notice it. *Barker v. Barker's adm'r*, 2 Grat. 344.

4. A bill of exceptions to the opinion of the court refusing a new trial, should state that the objection to the damages, as excessive, was taken in the motion to the court. *Law v. Law*, 2 Grat. 366.

5. An exception to an opinion of the court excluding testimony, must shew its relevancy, or the judgment will be presumed to be correct, in the appellate court. *Carpenter and wife v. Utz et als.*, 4 Grat. 270.

6. An exception to an opinion of the court, refusing a new trial, states all the evidence on the trial, instead of the facts proved. The appellate court can not consider the parol evidence of the appellant, but if upon the written evidence and the parol evidence of the appellee, the verdict was erroneous, the judgment will be reversed and a new trial awarded. *Pasley v. English et als.*, 5 Grat. 141.

7. A bill of exceptions to an opinion of the court, refusing a new trial, sets out the whole evidence, instead of stating the facts proved. The appellate court will not consider the question. *Forkner v. Stuart*, 6 Grat. 197.

8. A bill of exceptions to the opinion of the court refusing to grant a new trial, only states the facts which the evidence tended to prove: the court taking the evidence of the appellee to prove all it tended to prove, and that of the appellant as only tending to prove his conflicting pretensions, will consider whether the verdict and judgment are, or are not correct. *Moffatt v. Bowman*, 6 Grat. 219.

9. If a bill of exceptions to an opinion of the court below merely sets forth the testimony, which is uncertain and vague in its character, and its weight and the facts to be deduced therefrom, depend upon the credit given to the witnesses, it is not competent for an appellate court to review the judgment of the court below. *Harnsbarger's adm'r v. Kinney*, 6 Grat. 287.

10. Where the evidence is contradictory, the court which tried the cause, cannot be required to state in a bill of exceptions, either the evidence or the facts proved by the witnesses respectively. It is enough to state that the evidence was contradictory. *Grayson's case*, 6 Grat. 712.

11. In an action by an executor upon a refunding bond, after offering in evidence, the record of the decree against him, he offers the execution, which issued upon it and the return thereon, which is objected to, but admitted. The defendant excepts but fails to make the execution a part of the exception. The relevancy of the evidence being obvious without an inspection of the execution, it is not essential that it should have been inserted in the exception. *Archer v. Archer's adm'r*, 8 Grat. 539.

12. *Quære*: if the setting aside a venire-man, on the motion of the Commonwealth is a ground of exception by the prisoner. *Clores case*, 8 Grat. 606.

13. Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of the trial, cannot be looked to in considering another, yet where a bill of exception is taken after all the evidence has been submitted to the jury, and the bill of exceptions purports to set out all the evidence, it seems that evidence set out in this bill of exceptions may be looked to, in considering the question raised in another bill, taken in the progress of the trial; and this, though the evidence had not been introduced, after the first bill of exceptions had been taken. *Perkins' adm'r v. Hawkins' adm'r*, 9 Grat. 649.

14. A commissioner's report, made in a cause, had been returned for more than six years, and no exception taken to it, until the opinion was pronounced, and then it was excepted to for want of notice. It was proper to overrule the exception. *Miller v. Holcombe's ex'or et als.*, 9 Grat. 665.

15. A party complaining of the admission of improper evidence must state the facts, in his bill of exceptions, from which it will appear affirmatively to the appellate court, that the evidence was improper. *Johnson's ex'or v. Jennings' adm'r*, 10 Grat. 1.

16. A question is propounded to a witness, which is objected to, but the objection is overruled and an exception is taken. The bill of exceptions does not state the answer of the witness or that he answered the question. The appellate court will not reverse the judgment. *Ibid.*

17. If an exception is taken to an opinion of the court excluding testimony, the exception must shew the relevancy of the testimony, or it is no ground for reversing the judgment. *Ibid.*

18. An exception to an opinion of the court refusing an instruction asked, does not state the facts of the case, so as to show its relevancy. The appellate court will not undertake to decide whether the court below did right or wrong in refusing the instruction. *Fitzhugh's ex'or v. G. Fitzhugh*, 11 Grat. 300.

19. An exception to an opinion of the court refusing to grant a new trial only states the evidence, which is parol. The court will only consider the evidence of the appellee. *Farish & Co. v. Reigle*, 11 Grat. 697. *Noyes' ex'x v. Humphreys*, *id.* 636.

See APPEALS and NEW TRIAL.

---

## EXECUTIONS.

1. An execution issued by a justice of the peace of one county is valid,

though it purports to be issued in another county, if in fact, it was issued in the proper county. *Davis v. Davis*, 2 Grat. 363.

2. One bond of indemnity may be properly given by and received from plaintiffs in several executions. *Ibid.*

3. Upon a *bona fide* sale of personal property, though the vendee does not take possession at the time of sale, yet if he gets possession before an execution is issued against the vendor, his title is good against creditors. *McKinley, sheriff for Berry, v. Ensell et als.*, 2 Grat. 333.

4. The landlord's lien for a year's rent on the goods and chattels of his tenant does not extend to protect them from being taken under execution, except in cases where they are upon the demised premises. *Geiger's adm'r v. Harman's ex'x*, 3 Grat. 130.

5. A sale of property under execution by the sheriff, though irregular, if *bona fide*, is valid. *Carr's adm'r v. Glasscock's adm'r et als.*, 3 Grat. 343.

6. A *bona fide* purchaser of property at a sheriff's sale, under execution which is irregular, leaves the property in the possession of the original owner, but possession is taken thereof, by the administrator of the purchaser before creditors have acquired a specific lien thereon by execution. It is not liable to the original owner's creditors. *Ibid.*

7. The lien of an execution expires with the authority to sell. *Ibid.*

8. T. makes a parol loan of a slave to C. and the slave remains in the possession of C. and of C.'s executors for more than five years, and then T. takes possession of him. C.'s executors bring an action against T. to recover the slave, which goes against them. The creditors of C. who have obtained judgment against his executors have no right to take the slave in execution against a legatee of C., but having done so and the legatee having applied for and obtained an injunction against the sale of the slave, upon the hearing, the court may decree that the slave shall be sold to satisfy the debts due the creditors of T. *Taylor v. Beale et als.*, 4 Grat. 93.

9. Upon a motion to quash a writ and inquisition founded on a judgment at law, which motion is sustained, the writ and inquisition are a part of the record, though no bill of exceptions is taken; and will be so treated in the court of appeals. *Wallop's adm'r v. Scarborough et als.*, 5 Grat. 1.

10. A stranger having acquired an equitable right to the benefit of an execution, or to the property on which it is levied, will generally have authority to sue out and conduct the process, or to object to its regularity or validity; but he must do it in the name of a legal party to the process, or one who can be made so. And his authority to use the name of the party to the process in a court of law, will be so far recognized by such court, as to preclude the intervention of such party for the purpose of defeating it. *Ibid.*

11. A decree directs a sale of land, if a sum certain is not paid by a certain day. The clerk has no authority to issue an execution on this decree, without an order of the court or of the judge in vacation. *Shackleford v. Apperson*, 6 Grat. 451.

12. Though circumstances may exist which will warrant the court or the judge in vacation to allow process of execution on such an interlocutory decree, these circumstances must be shewn, and if they are not shewn, it is improper to allow it. *Ibid.*

13. If an execution is allowed by the clerk on such a decree, without order of the court, the court may quash the execution in term, or the judge in vacation may restrain the proceedings upon it, by an injunction order. *Ibid.*

14. A mere countermand of an execution by a creditor after it has gone into the hands of the sheriff, but before it is levied, does not relieve the surety of the execution debtor. *Humphrey v. Hite*, 6 Grat. 509.

15. A tender of money in payment of a judgment will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and motion is made to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Grat. 592.

16. A court of equity will not interfere to stop an execution upon the ground of the tender of the money in payment of the judgment, where there is neither allegation nor proof that the defendant in the execution kept the money on hand for the discharge of the judgment.

17. The common law writ of *capias pro fine* is unrepealed and may be used by the commonwealth. *Webster's case*, 8 Grat. 702.

18. Where there is a judgment in favor of the commonwealth for a fine, and costs of prosecution, the writ may issue for the fine and costs; but where the judgment is for costs only, the writ is not a proper process to enforce the judgment. *Ibid.*

19. Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. But the term of such imprisonment is limited by the provisions of the Code, ch. 209, § 17, p. 781. *Ibid.*

20. A sheriff is entitled to commissions on a *ca. sa.* executed on the defendant, who after taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon discharged from custody before the return day of the execution. *Gardner v. Neal*, 9 Grat. 85.

21. A party claiming that he has not been credited with all the money paid by him to the sheriff upon an execution, may have any injustice done

to him, in that respect, corrected by the court from which the execution issued; and it is not a case for an injunction and relief in equity. *Morrison v. Speer*, 10 Grat. 228.

22. The issue of an execution after a year and a day from the date of the judgment, renders the execution not void, but voidable; and this irregularity cannot be taken advantage of in an action founded upon the return on the execution. *Beale's adm'r v. Botetourt justices*, 10 Grat. 278.

23. A mere error of form in an execution issued against an executor, where it has been treated throughout as an execution *de bonis testatoris*, cannot be set up as a defence to an action of *devastavit* against the executor and his sureties, founded upon the return upon it. *Ibid.*

24. A sheriff may have leave to amend his return upon an execution, after notice of a motion against him, founded on the original return. And the amended return may be made by a deputy, who did not make the original return. *Stone v. Wilson*, 10 Grat. 529.

25. An *elegit* issued upon a judgment rendered against a bankrupt, before his bankruptcy, may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all his property not subject to the lien of a judgment, levy the *elegit* upon that only which is so subject. *McCance v. Taylor*, 10 Grat. 589.

---

## EXECUTORS.

See PERSONAL REPRESENTATIVE.

---

## EXECUTORY CONTRACTS.

See CONTRACTS.

---

## EX POST FACTO LAWS.

1. The provision in the Constitution forbidding *ex post facto* laws relates to crimes and punishments, and not to the mode of proceeding in criminal cases. *Perry's case*, 3 Grat. 632.

2. Though an offence committed before the Code of 1849 went into operation, must, so far as the question of guilt, degree of crime, *quantum* of punishment and rules of evidence are concerned, be governed by the law in force at the time the offence was committed, yet upon the question of the prisoner's right to be discharged, from the failure to try him, arising after the Code went into operation, it must be governed by the law in the Code. *Adcock's case*, 8 Grat. 661.

## FERRIES.

1. Ferry franchise in Virginia is the creature of the statute law; and the rights of the owner of the ferry are to be measured by the statute. *Somerville v. Wimbish*, 7 Grat. 205.

2. Though a ferry has been established for any length of time across a river, it is competent for the legislature to establish another ferry from the other side of the river, to pass along the same line used by the first; and this is no invasion of the ferry franchise of the owner of the first ferry. *Ibid.*

3. The establishment of such a ferry, confers upon the owner no title to any portion of the soil on the other side of the stream, and no easement there, beyond the incidental delegation of such as has been theretofore, or may be thereafter acquired by the public as a highway. *Ibid.*

4. *Quære*: if in such case, the ferry franchise will carry with it the privilege of using any public roads on the opposite land for the purpose of landing or taking in passengers. *Ibid.*

5. The order of the county court, directing the justices to be summoned to consider the verdict of the jury in ferry cases, may be executed by leaving a notice in the mode directed in the general law in relation to notices. *Ibid.*

6. A person who signed a memorial to the legislature for the establishment of a ferry, is not thereby rendered incompetent to serve on the jury. *Ibid.*

7. The judgment of a county court, giving leave to an applicant to erect a dam, provides that the applicant shall keep a ferry boat at the crossing of a public road over the stream across which the dam is to be erected. The county and circuit courts having held, upon the proofs that a ferry boat will be sufficient to accommodate the public, the court of Appeals will presume that they acted correctly, nothing being shown to the contrary. *Mairs v. Gallahue*, 9 Grat. 94.

8. The duty of keeping up the ferry boat is not merely personal to the grantor of the privilege of erecting the dam, but it is a condition of and incidental to the grant and attaches to it, into whosoever hands it may pass. *Ibid.*

9. The kind of boat to be kept must be such a one as the exigencies of the travel and trade on the road shall require. *Ibid.*

10. It is the duty of the party required, in such a case, to keep up the ferry boat, to ferry the public over the stream free of charge. *Ibid.*

## FINES.

SEE FORFEITURES AND PENALTIES.

## FORCIBLE ENTRY AND DETAINER.

1. In a proceeding of forcible entry and detainer, the court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law, to the next county court. *Mann v. Gwynn et als*, 8 Grat. 58.

2. Upon a writ of unlawful detainer, the defendant sets up title in himself. The plaintiff may prove that the defendant entered on the premises under a parol lease from himself, though the lease proved was for more than a year. *Adams v. Martin*, 8 Grat. 107.

3. In a writ of unlawful detainer, the defendant claiming title under a deed to himself and another, as joint tenants, that other person is not a competent witness for him to sustain his right of possession. *Ibid.*

4. An unlawful detainer case removed to the circuit court, is properly placed on the docket at the head of the civil causes in the court. *Harrison v. Middleton*, 11 Grat. 527.

5. A landlord sells land in possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession, the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. *Ibid.*

6. If a case of unlawful detainer has been pending in the county court for more than twelve months, without a final decision, it may be removed to the circuit court: *Id. and Kincheloe v. Tracewells*, 11 Grat. 587.

7. The year is to be estimated from the organization of the court summoned to try the unlawful detainer. *Kincheloe v. Tracewells*, 11 Grat. 587.

8. To entitle the plaintiff to recover possession upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding possession by the defendant, that may be aided by the complaint, which states the fact. *Ibid.*

9. A senior patentee holds and cultivates his land outside of an interlock. A junior patentee afterwards takes possession, and clears and cultivates his land outside of the interlock and also clears and encloses a part of the interlock, and exercises such acts of ownership over the whole as constitutes adversary possession; and after five years dies. The possession of the heirs is not limited to their inclosure; and the entry of the senior



patentee upon the heirs is tolled. He cannot recover by a warrant of unlawful detainer. *Ibid.*

10. If possession is taken under a mistake as to the true boundary, the fact is immaterial in a proceeding for an unlawful entry and detainer. *Ibid.*

---

## FOREIGN ATTACHMENTS.

SEE ATTACHMENTS.

---

## FORFEITED LANDS.

SEE DELINQUENT AND FORFEITED LANDS.

---

## FORFEITURES AND PENALTIES.

1. T. sells to P. a slave, in which he has but a life estate and P. in ignorance of the fact and believing that he has an absolute interest in the slave, takes him out of the State and sells him. P. is liable to the forfeiture and penalties imposed by the act 1 Rev. Code, ch. iii, § 48, p. 431. *Poindexter &c. v. Davis et als*, 6 Grat. 481.

2. A party in a cause is not bound to answer interrogatories which may subject him to a penalty or forfeiture. *Ibid.*

3. This rule is not confined to cases where the purpose of the action is to enforce the penalty or forfeiture, but extends to cases where the discovery itself would expose the party to some action or suit or any penal or criminal prosecution tending to the like result. *Ibid.*

4. A. and P. unite in the purchase of land upon a credit and it is agreed between them, that if P. fails to pay all or any portion of his share of the purchase money, so that A. has to pay it, A. shall have the whole land and shall repay to P. any part that he has paid. This is a forfeiture which a court of equity will relieve. *Asher v. Pendleton et als*, 6 Grat. 628.

5. The common law writ of *capias pro fine*, is unrepealed and may be used by the Commonwealth. *Webster's case*, 8 Grat. 702.

6. Where there is a judgment in favor of the Commonwealth for a fine and costs of prosecution, the writ may issue for the fine and costs, but where the judgment is for costs only, the writ is not a proper process to enforce the judgment. *Ibid.*

7. Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. But the term of imprisonment under such *capias* is limited by the provisions of the Code, ch. 209, § 17, p. 781. *Ibid.*

8. Upon a joint indictment against husband and wife for selling ardent spirits; if they are convicted, there must be a separate fine against each. *Hamor and wife's case*, 8 Grat. 698.

---

### FORGERY.

1. In an indictment for forging a negotiable note, it is not necessary to set out the endorsements upon it. *Perkins' case*, 7 Grat. 651.

2. The paper does not cease to be a negotiable note, because for some informality, a bank would not discount it. *Ibid.*

3. The words "to the prejudice of another's right" in the Code, ch. 193 § 5. p. 733, in relation to forgeries are descriptive, not of the offence, but of the writings by which forgery may be committed; and it is not therefore necessary that they shall be inserted in the indictment, in describing the offence. *Powell's case*, 11 Grat. 822.

4. The maker of a negotiable note passes it to the payee with the name of a third person endorsed upon it, which name he forged. The forgery of the name upon the paper constitutes the offence of forgery. *Ibid.*

5. The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment; though the simulated liability may not be technically that of an endorser, but of a different character. *Ibid.*

---

### FORTHCOMING BONDS.

1. A forthcoming bond, given by one of three joint debtors in a judgment, and forfeited, does not discharge and extinguish the original debt, as against the other joint debtors. *Robinson et als v. Sherman et als*, 2 Grat. 178. *Leake v. Ferguson id.*, 419.

2. The surety in the forthcoming bond is surety for the debt. *Robinson et als v. Sherman et als. Id.*

3. A forthcoming bond has the force of a judgment so as to create a lien upon the lands of the obligor, only from the time the bond is returned to the clerk's office. *Jones &c. v. Myrick's ex'ors*, 8 Grat. 179. *Myrick's ex'ors v. Epes et als. Id.*

4. There being no evidence that the bond was returned to the clerk's office before the day on which there was award of execution thereon by the court, it will be regarded as having been returned to the office on that day. *Ibid.*

5. A forfeited forthcoming bond not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, does not relate back to the first day of the term. *Ibid.*

6. Though a forthcoming bond is forfeited and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond and thus revive the lien of the original judgment; and a court of equity having jurisdiction of the subject will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment. *Ibid.*

7. The forthcoming bond is signed by the debtor, a third person and the creditor in the execution. The bond is valid to bind the debtor, and the first security; but the first security is only a co-security with the creditor and entitled to contribution from him. *Booth v. Kinsey*, 8 Grat. 560.

8. In such a case, if the debtor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity, or by motion under the statute for relief of sureties. *Ibid.*

9. In such case the motion on the forthcoming bond is not defective for failing to name the obligor as a co-obligor. *Ibid.*

10. An award of execution on a forfeited forthcoming bond cannot be successfully resisted on account of the invalidity of the original judgment, unless such judgment is null and void. *Pates v. St. Clair*, 11 Grat. 22.

11. A surety in a forthcoming bond is a surety for the debt, and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, existing at the time he became bound for the debt; and the judgment for the benefit of the surety so paying is not extinguished, but is transferred with all its obligatory force against the principal and constitutes a legal lien upon his real estate, owned at the date of the judgment or afterwards acquired. *Hill v. Manser et als*, 11 Grat. 522.

12. The surety in a forthcoming bond pays to the creditor a sum certain, on the execution issued on the bond against the principal and himself, and takes a receipt as for money paid by him. The evidence of payment, afforded by the receipt, will not be repelled by proof of loose declarations, that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor. *Ibid.*

13. The creditor having taken a deed of trust from the principal debtor, to secure the debt, and the debtor having subsequently given another deed of trust upon the same and other property to secure debts to a third party, one of which was for money loaned to pay a balance due on the judgment of which this third party had notice; the surety in the forthcoming bond is entitled to have the property, embraced in the first deed, applied to satisfy the amount he has paid, with interest on so much thereof as would discharge the principal of the debt, and if that property does not discharge it, to have the land embraced in the second deed, subjected to discharge the balance. *Ibid.* SEE BONDS.

---

### FRANCHISES.

1. The officers of a private corporation have no franchise in their offices. *Burr's ex'or et als v. McDonald et als*, 3 Grat. 215.

2. The franchise, as well as the property of the citizen, may be taken for public purposes, upon making compensation therefor. *James River & K. Co. v. Thompson & Teays*, 3 Grat. 270.

3. Ferry franchise in Virginia is the creature of the statute law; and the rights of the owners of the ferry are to be measured by the statute. *Somerville v. Wimbush*, 7 Grat. 205.

---

### FRAUDS.

1. A purchase of property by an executor, at his own sale thereof, may be avoided by the parties interested therein. *Bailey's adm'x v. Robinsons*, 1 Grat. 4.

2. A purchase of property by an executor, at his own sale, being set aside, he will not be held to take it at what it was then worth, upon the estimate of witnesses, but it will be sold again, if more can be obtained for it; and if this cannot be done, his purchase will be confirmed. *Ibid.*

3. A deed of trust for the benefit of creditors, conveys away other things, cattle, household and kitchen furniture, and debts, without specification in the deed or in the schedule accompanying it. It provides that the grantor shall remain in possession of the property six months; and that no creditor shall have the benefit of the trust who does not release the grantor from any further liability, in three months. The deed is not therefore fraudulent. *Kewan v. Branch*, 1 Grat. 274.

4. A deed of marriage settlement, made before marriage, conveying the property of the feme, and in which the intended husband joined, is fraud-

ulent and void as to subsequent purchasers from the husband without notice, unless duly recorded. *Thomas v. Gaines*, 1 Grat. 347.

5. A court of equity will, at the suit of a creditor of an insolvent debtor, pursue property, the avails of his labor, in the hands of parties uniting with him to screen the same from his creditors, or in the hands of volunteer purchasers from them. *Commonwealth v. Ricks &c.*, 1 Grat. 416.

6. Upon a *bona fide* sale of personal property, though the vendee does not take possession at the time of the sale, yet if he gets possession before an execution is issued against the vendor, his title is good against creditors. *McKinley, sheriff, for Berry v. Ensell et als*, 2 Grat. 333.

7. So, though after such possession, he employs the vendor as his agent to sell the property; and the vendor is in his possession as his agent, at the time the execution issues and is levied upon it. *Ibid.*

8. Property purchased at a sheriff's sale under execution, which though the sale was irregular, was *bona fide*, and left with the debtor, is not subject to the creditors of the debtor. *Carr's adm'r v. Glasscock's adm'r et als*, 3 Grat. 343.

9. A purchaser of property leaves it in possession of the original owner, but possession thereof is taken by the administrator of the purchaser before creditors have acquired a specific lien thereon, by judgment and execution. It is not liable to the original owner's creditors. *Ibid.*

10. Whilst property is so in the original owner's possession, he conveys it in trust to secure a surety who has notice of the first purchase. The administrator of the first purchase is entitled to the property against the surety. *Ibid.*

11. *Quære*: If the first sale had been fraudulent in fact, notice of the sale would have precluded the claimant under the first deed. *Ibid.*

12. The fraud of the maker of a note, by which he induces his surety to sign it, of which the payee has no notice, does not entitle the surety to relief in equity against the innocent payee or holder. *Griffith et als v. Reynolds*, 4 Grat. 46.

13. An administratrix who sells the property of the estate at a very great sacrifice, and buys it herself, will be held to account for it at the appraised value. *Cross' curatrix v. Cross' legatees*, 4 Grat. 257.

14. An administratrix who hires out the slaves publicly and hires them herself at very reduced prices, and then hires them out to others at advanced prices, will be held to account for them at the advanced price, or if that cannot be ascertained, for reasonable hires. *Ibid.*

15. The doctrine of fraud *per se* examined and repudiated. *Davis v. Turner*, 4 Grat. 422.

16. The retaining possession of personal property by the vendor, after an absolute sale, is *prima facie* fraudulent; but the presumption may be rebutted by proof. *Ibid.*

17. Slaves remaining in possession of one person on hire, for more than five years, are not subject to be taken in execution for his debts. *McKenzie et als v. Macon*, 5 Grat. 379.

18. The act 1 Rev. Code, ch. 101 § 2 p. 372 does not apply to the case of property remaining in possession of one person for more than five years on hire. *Ibid.*

19. A person expecting a judgment against him in an action *ex delicto*, transfers bonds held by him, and conveys an interest in real and personal estate, to evade the payment of the judgment. The transfers and conveyances will be set aside at the suit of the judgment creditor. *Green v. Wright*, 6 Grat. 154.

20. On a sale of slaves, if the possession remains with the vendor, it is *prima facie*, evidence of fraud, but is not conclusive; and it may be repelled by satisfactory legal evidence of the fairness of the transaction. *Forkner v. Stuart, &c.*, 6 Grat. 197.

21. On a contract for the hire of a slave, fraud cannot be inferred from the unfitness of the slave for the purpose for which he was hired, and a knowledge of such unfitness by the owner. *Howell &c. v. Coles*, 6 Grat. 393.

22. A deed of trust held to be fraudulent on its face, though executed to indemnify a *bona fide* surety. *Spence v. Bagwell et als*, 6 Grat. 444.

23. When a court of equity will investigate a fraud, though the plaintiff has a remedy at law. *Henley's adm'r v. Perkins et als*, 6 Grat. 615.

24. A vendor is entitled to relief on account of the fraudulent concealment of facts by the purchaser. But under the circumstances, the proper mode of relief was held to be compensation for the injury, and not a rescission of the contract. *Armistead v. Hundley*, 7 Grat. 52.

25. The grantor in an absolute conveyance of personal property, continuing in possession, raises the presumption of fraud as regards creditors of the grantor, and throws upon the grantee the burthen of proving the fairness and *bona fides* of the transaction. *Curd v. Miller's ex'ors*, 7 Grat. 185.

26. The surety of the grantor may direct the execution issued against himself and the grantor to be levied on the property; and set up the fraud in the conveyance. *Ibid.*

27. A gift of slaves to a married daughter, by a father largely indebted at the time, in proportion to his property, is fraudulent as to his creditors

and may be subjected by a party becoming his surety in a forthcoming bond more than five years after the gift. *Wilson v. Buchanan*, 7 Grat. 334.

28. In written proposals for a sale of stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury and in which they are presumed to have trusted to the vendors, then the contract founded in such representations is void whether the vendors knew the representations to be false at the time they were made or not and whether made with a fraudulent intent or not. *Crump v. United States Mining Company*, 7 Grat. 352.

29. In such case the suppression from the written proposals of any fact known to the vendors, materially affecting the value of the thing to be sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material fact, if the purchaser is injured thereby. *Ibid.*

30. If an agent for the sale of property makes false representations of its value and condition, the principal is affected thereby, and cannot enforce the contract for the sale of the property; and that though the principal gives him a written description of the property. *Ibid.*

31. A purchase of bonds from an executor at a discount of eighteen per cent, with knowledge that the condition of the estate does not require the sale, is a fraud in the purchaser, though he may know that they do not amount to more than the executor's interest in the estate, and the executor not having paid to the other legatees their portion of the estate, the purchaser will be compelled to repay the money to them. *Pinckard v. Woods &c.*, 8 Grat. 140.

32. If the sureties of the executor have been compelled to pay the amount to the legatees, they may recover from the purchaser. *Ibid.*

33. A deed of trust to secure creditors requires them to signify their acceptance of it by signing it within thirty days, and to release the debtor. The creditors being dissatisfied with the provisions, it is agreed between them and the debtor that they will not sign it; but two of them who had entered into this agreement sign the deed two days before the thirty days expire, with the avowed purpose that it is for the benefit of all. After this, one of these comes into equity to enforce the deed for the benefit of himself and the other who signed. A court of equity will not entertain him. *Phippen v. Durham*, 8 Grat. 457.

34. A party who has been guilty of any fraud or illegal conduct in the transaction cannot recover back money paid by him on a contract which has been wholly rescinded, or the consideration of which has wholly failed. *Johnson's ex'or v. Jennings' adm'r*, 10 Grat. 1.

35. To constitute fraud in the sale of goods, it is not enough to represent them as sound and marketable, when they were unsound and damaged, unless the vendor knew that the representations were untrue, or used some fraud or act to disguise or conceal their true condition or quality. *Cunningham v. Smith et als*, 10 Grat. 255.

36. But if the representations were untrue and the vendor at the time of making them knew them to be untrue, and knowingly made them with intent to deceive the purchasers, that is fraud. *Ibid.*

37. An insolvent debtor N. purchases slaves at a public sale, pays for them through another and has the receipt taken in the name of, and the slaves delivered to his sister, an infant living with her father. N. afterwards took the insolvent debtor's oath, on a *ca. sa.* and the sheriff brought separate actions of detinue against the father and sister to recover the slaves. Held, 1st. Though N. never had possession of the slaves, but they were transferred by a fraudulent arrangement to a third person, the sheriff may recover them from the third person. 2d. Though the sister to whom the slaves were delivered, was an infant at the time when the action was instituted, yet as she did not set up the infancy to defeat the action and as it may reasonably be inferred from the evidence that she was of full age, when the cause was heard upon a demurrer to the evidence, and appeared and defended herself by counsel, she is bound by the judgment. 3d. Though the slaves were sent to and remained upon the premises of the father, yet as his daughter lived with him and claimed the slaves, and he did not, the action cannot be maintained against him. *B. Staton v. Pittman sh'ff*, 11 Grat. 99. *R. Staton v. Pittman, sh'ff. Id.*

38. The same person is guardian of two wards and he transfers a bond belonging to one of his wards, to the husband of the other, in payment of his wife's estate, the husband not knowing or having any reason to suspect, that it belongs to the other ward, the guardian and his sureties being then wealthy. Afterwards the guardian fails. The husband who received the bond is not responsible to the ward whose property the bond was for the amount thereof. *Hunter v. Lawrence's adm'r et als*, 11 Grat. 111.

39. The principle upon which a party dealing with a fiduciary is held responsible, is, that he has co-operated in the fraud of the fiduciary. *Ibid.*

40. An action on the case for fraud, in selling an unsound slave to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or of a fraudulent concealment of the unsoundness of the slave, cannot be maintained against the personal representative of the vendor; and if there be judgment in such an action, in favor of the plaintiff, the error will not be cured by the statute of Jeofails. 1 Rev. Code 1819, ch. 128 § 103, p. 511. *Boyle's adm'r v. Overby*, 11 Grat. 202.\*

\* See Code of Va. ch. 130 § 19, *et seq.*



41. A decree of a court of equity set aside upon the ground of fraud in its procurement on a bill against the heirs at law of the party procuring the decree. *Evans et als v. Spurgin et als*, 11 Grat. 615.

---

SEE STATUTE OF FRAUDS AND DEEDS.

---

FREE NEGROES.

1. The offence of a free negro in coming into the State and remaining therein in violation of the 28th and 29th sections of ch. 198 of the Code of Va. is a misdemeanor, for which he is liable to be prosecuted and punished, in the manner provided for in the 28th section. *Morris, ex parte*, 11 Grat. 292.

2. Upon conviction of such a misdemeanor, the party is entitled, as of right, under § 15, of ch. 213 of the Code to an appeal from the decision of the justice, to the court of the county or corporation in which his conviction was had; and it is the duty of the justice to allow the appeal, if duly applied for. *Ibid*.

3. If, in such a case, the appeal is duly applied for and refused by the justice, the party may have relief by *mandamus* from the circuit court. *Ibid*.

4. If the circuit court refuses to issue a *mandamus*, in such a case, the party may apply to the supreme court of appeals for a supersedeas or writ of error; and have the action of the circuit court reviewed. *Ibid*.

---

GAMING.

1. Money lent to be betted upon a presidential election, with the knowledge of the lender at the time of the loan, cannot be recovered by suit. *Machir v. Moore*, 2 Grat. 257.

2. In an action at law, on a promise founded on a gaming consideration, if the defendant is surprised at the trial, and there is a verdict and judgment against him, he may come into equity for relief, though he made no effort to obtain a new trial in the common law court. *White v. Washington's ex'or*, 5 Grat. 645.

3. *Quære*: If such defendant may not come into equity for a discovery, and if the discovery is made, whether he may not have relief, though there was no surprise on the trial at law. *Ibid*.

4. The county of Jackson owned a piece of land for the purpose of

L

maintaining paupers, which was leased to William Humphreys. Humphreys had a shooting match on the land. While the shooting was going on V. and others went up a ravine about two hundred yards from the place of shooting and played bluff. They could not be seen from the place of shooting. This is not playing cards at a public place. *Vandine's case*, 6 Grat. 689.

5. A court of equity will not lend its aid for the purpose of settling the transactions of a partnership for gambling. *Watson v. Fletcher*, 7 Grat. 1.

6. Though the pleadings do not show the nature of the partnership, yet, if it appears from the evidence taken before the commissioner, the court will refuse to settle the gambling account. *Ibid.*

7. One of the partners qualifies as the administrator of the other, he cannot question the right of his intestate to a moiety of the property, though bought and used for gambling purposes. *Ibid.*

8. A store-house in a village, late at night, after persons cease coming to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming. *Feazle's case*, 8 Grat. 555.

9. Betting on a horse race is not gambling within the meaning of the 10th section of the act 14th March 1848, concerning crimes and punishments, and proceedings in criminal cases. *Shelton's case*, 8 Grat. 592.

---

### GIFT.

1. A parol gift of real estate, by a father, to a daughter is made, and she is put into possession of the property; but before she obtains a conveyance of the property, the father becomes insolvent. The gift is void as to creditors. *Commonwealth v. Ricks*, 1 Grat. 416.

2. Father gives slaves to his child, in his lifetime; and afterwards directs his own slaves, with those lent to his children, to be equally divided among them. It being apparent that he intended that all his children should have equal portions of his estate—the slaves given to the child must be accounted for, as of their value at the time of the division of the estate. *Kean v. Welch*, 1 Grat. 402.

3. A parol gift of a slave, to take effect upon the death of the doner who is not then sick, is void. *Barker v. Barker's adm'r*, 2 Grat. 344.

---

### GRAND JUROR.

SEE JUROR.

## GUARANTOR AND GUARANTEE.

1. The transferrer for value of a negotiable note, though not a guarantor of the solvency of the parties to the note, is a guarantor of the genuineness of the instrument. *Lyons v. Miller*, 6 Grat. 427.

2. So, if the transferrer is but an agent, unless he discloses not only his agency, but the name of his principal. *Ibid.*

3. J. executes to W. a note payable on demand, which is endorsed in blank by B., who thereby intends to guaranty the payment of the note. The endorsement imports a guarantee according to the terms of the note; and this cannot be altered by proof of a parol agreement at the time of the endorsement that the note was not to be paid until the happening of a future contingent event. *Watson v. Hurt*, 6 Grat 633.

4. If five years elapse from the date of the note, before suit brought upon the guarantee, it is barred by the statute of limitations. *Ibid.*

5. A letter of credit addressed to W. and W. may be proved to have been intended for W. W. & Co. so as to hold the writer bound to the latter upon it. *Wadsworth et als v. Allen &c.*, 8 Grat. 174.

6. A guarantor may specify, in the letter of credit which he gives, the terms on which he will be bound; though the law, in the absence of all prescription of terms in the letter of credit, would have prescribed the performance of other acts by the party seeking to subject him upon his guarantee. *Ibid.*

7. A guarantor undertaking to pay, upon receiving reasonable notice of the failure of the principal debtor to pay the debt when due, dispenses with notice of the acceptance of the guarantee by the party to whom it is addressed, even if the law would require such notice. *Ibid.*

8. What is reasonable notice, of the failure of the principal debtor to pay, is a question for the jury to decide. *Ibid.*

9. The fact that the principal debtor gave his bond for the goods he purchased, did not release the guarantor. *Ibid.*

10. A guarantor of a debt may maintain a foreign attachment against the principal debtor, before he has paid the debt. *Moore et als v. Holt*, 10 Grat. 284.

11. A letter written by a party, to merchants with whom he had been in the habit of dealing, introduces to them his brother, who was a stranger to them; stating that he was going to their city to purchase goods and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his, will and shall be promptly paid" is a guarantee. *Ibid.*

## GUARDIAN AND WARD.

1. The principal of a ward's personal estate may be applied to the improvement of his real estate, if for his interest. *Jackson's adm'r v. Jackson's heirs*, 1 Grat. 143.

2. The allowance for the support, maintenance and education of a ward must be limited to the annual profits of his estate. *Ibid.*

3. The whole annual profits of a ward's estate, up to the time of his coming of age may be applied to the expenses of the ward. *Ibid.*

4. A surety of a guardian is not protected by lapse of time, or the statute of limitations, against the claim of the ward who has been prosecuting a suit against the administratrix of the guardian. *Roberts v. Colvin*, 3 Grat. 358.

5. A decree should not be made against the surety of the guardian, until the account of the administratrix of the guardian is settled and an enquiry is directed to ascertain whether any estate, real or personal of the guardian remains. *Ibid.*

6. Children live with their mother on her estate, for which she makes no charge, but their guardian makes advances to aid her to support the family. As it cannot be known how much of these advances has been applied to the support of each child, the guardian should have a reasonable allowance for the support of his ward. *Cunningham v. Cunningham*, 4 Grat. 43.

7. Two months are allowed guardian for collecting and investing the annual profits of his ward's estate. *Ibid.*

8. In stating a guardian's account, it should be closed at the time when the guardianship terminated, and from that time the account should be adjusted on the ordinary principle of debtor and creditor. *Ibid.*

9. It is error to aggregate the principal and interest due on the guardian's account and give a decree for the whole amount with interest thereon. *Ibid.*

10. A second guardian of an infant has no authority to file a bill in his own name against a former guardian, for an account of his transactions in relation to the ward's estate. *Lemon, guardian v. Hansberger*, 6 Grat. 301.

11. An infant may, by his next friend, call the acting guardian or any preceding guardian, to account, by a bill in chancery, but the bill must be in his own name by his next friend. *Ibid.*

12. In a suit in equity by the guardian of infants for the sale of their

real estate, a guardian *ad litem* for the infants may be appointed at rules. *Talley et als v. Starke's adm'r et als*, 6 Grat. 339.

13. A guardian is not authorized to file a bill in his own name to obtain possession of his ward's estate. He must file it in the name of the ward by his next friend. *Sellings et als v. Bumgardner et als*, 9 Grat. 273.

14. A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and has kept no account against them. *Armstrong's heirs v. Walkup et als*, 6 Grat. 374.

16. A payment made to the husband of one of three, who had been wards and who is guardian of another of them, though intended to be a payment to all is not to be credited against the third ward, who is then an adult; she not having authorized him to receive it, but is to be credited against the husband and wife and his ward. *Ibid.*

16. The accounts of the three wards should be stated separately, from the commencement, or at least, when their expenses differed in amount. *Ibid.*

17. One of the wards being still an infant, there should not be a joint decree in their favor, though made with the consent of the next friend of the infant. *Ibid.*

18. A bond executed to an executor is transferred by him to a guardian, as part of his ward's estate. Whatever interest the ward has in the bond, is subject to the control of the guardian, who may receive the money, if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian and cannot be prevented by the executor; or he may sell and transfer the bond. *Hunter v. Lawrence's adm'r et als*, 11 Grat. 111.

19. As a general rule, the guardian has the legal title of the ward's personal estate, and has the power and authority to sell it. *Ibid.*

20. A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt. *Ibid.*

21. The fraud of a guardian in disposing of the property of his ward, is not sufficient, of itself under all circumstances to invalidate his transactions with innocent parties. *Ibid.*

22. The same person is guardian of two wards, and he transfers a bond, belonging to one of his wards to the husband of the other, in payment of his wife's estate; the husband not knowing or having any reason to suspect that it belongs to the other ward; the guardian, and his sureties also, being then wealthy. Afterwards the guardian fails. The husband who

received the bond is not responsible to the ward whose property the bond was, for the amount thereof. *Ibid.*

23. The principle upon which a party dealing with a fiduciary is held responsible, is, that he has co-operated in the fraud of the fiduciary. *Ibid.*

24. A guardian qualified in 1821. In 1825, he transferred in payment of a debt, a bond of his ward to a party wholly innocent of any participation in the guardian's fraud; the ward comes of age in 1832 and takes no steps to obtain his estate from his guardian till 1840, when the guardian becomes insolvent. He then sues the sureties of the guardian and recovers from them the amount due to him from his guardian. In all this time, the sureties had done nothing to secure the faithful discharge, of his duties by the guardian, or to compel him to pay over to the ward his estate on his coming of age. Even if the party who had received the bond from the guardian could be held responsible to the ward, he is not responsible to the sureties of the guardian. *Ibid.*

---

### HABEAS CORPUS.\*

1. A court having jurisdiction of the case, having tried a negro as a free man, and sentenced him to imprisonment in the penitentiary, the general court cannot on the application of persons claiming the negro as a slave, discharge him from his imprisonment, by a proceeding by *habeas corpus*. *Ball and Satterwhite ex parte*, 2 Grat. 588.

2. The *habeas corpus* is a remedy which only lies on the part of the person illegally imprisoned, or of some other person on his behalf. It does not lie for a master in a case of illegal imprisonment of his slave. *Ibid.*

3. The court of appeals has no jurisdiction to grant a writ of error to a judgment upon an application for a writ of *habeas corpus*. *Bell v. The Commonwealth*, 7 Grat. 201.

4. The petition for a writ of *habeas corpus* to obtain possession of a child may be in the name of the infant by his next friend or in the name of the person claiming possession; and where it is the mother of the child claiming possession and she is married the second time, it may be in the name of the mother and second husband. *Armstrong v. Stone and wife*, 9 Grat. 102.

5. The proper office of a writ of *habeas corpus* is to release from illegal restraint; and where the party is of years of discretion and *sui juris*, nothing more is done than to discharge him. But if he be not of an

\* See Code of Va. Constitutional Provisions p. 17, 40. Id. ch. 15, § 7, p. 96. Id. pp. 613—4.

age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody; determining to whom that custody belongs. *Ibid.*

---

## HEIRS AND DEVISEES.

1. Heirs and devisees are entitled to the rents and profits of the real estate descended or devised, until a decree of the court, subjecting them to the payment of debts. *Hobson v. Yancey et als*, 2 Grat. 73.

2. The heir is entitled to the interest upon surplus proceeds of land sold by a trustee, after the death of the grantor in the trust deed, up to the time of the decree directing the distribution of said surplus proceeds among creditors. *Jones v. Lackland et als*, 2 Grat. 81.

3. Heirs are only bound by judgments against their ancestor, when they cannot be paid out of the personal assets. *Rogers v. Denham's heirs*, 2 Grat. 200.

4. If the heir is sued, before proceedings are had against the personal representative, he must make that objection by plea in abatement. *Ibid.*

5. Heirs are entitled to have the personal assets of the ancestor applied to satisfy his debts for their relief. *Beall's adm'r v. Taylor's adm'r et als*, 2 Grat. 532.

6. A foreign judgment does not merge the specialty on which it is founded, as against the heirs of the debtor in Virginia. *Ibid.*

7. A party seeking to subject heirs to the payment of the bond of the ancestor, must show by satisfactory proof that the heirs are bound by the bond. *Piper v. Douglass' ex'or*, 3 Grat. 371.

8. Husband and wife, each hold the equitable estate in one moiety of a tract of land, for which a patent issues to the husband and wife. Though on the death of the wife, the legal estate in the whole tract vested in the husband surviving, the wife's equitable estate, in her moiety, descended to her heirs, subject to the trust and life estate of the husband as tenant by the curtesy. *Norman's ex'x v. Cunningham and wife et als*, 5 Grat. 63.

9. The husband holds the legal title of the undivided moiety of the wife, in trust for her heirs. *Ibid.*

10. The husband having sold the land to *bona fide* purchasers without notice, equity will compensate the heirs of the wife out of the estate of the husband. *Ibid.*

11. *Quære*: Whether the measure of compensation is the value of the

land at the time of the sale, or the value at the death of the husband, excluding permanent improvements made since the sale. *Ibid.*

12. The heirs of the wife are not precluded from claiming the land by their taking as devisees and legatees under the will of the husband. *Ibid.*

13. The heirs of the wife, being the children of the husband are not barred by the collateral warranty of the husband in his deeds of conveyance to the purchasers of the land. *Ibid.*

14. One of the heirs of the wife, not having been heard of for seventeen years and being then an infant, her share was divided amongst the other heirs of the wife, upon their executing bonds payable to the judge and his successors in office, with condition to indemnify the executrix of the husband against the claim of the absent heir. *Ibid.*

15. A creditor of a deceased debtor may proceed by foreign attachment against the heir residing abroad, to subject land or its proceeds in the State, descended to them from the debtor. *Carrington et als v. Didier, Norvell & Co.*, 8 Grat. 260.

16. So he may proceed against them as absent defendants in equity to marshal the assets and thus subject the land descended to them. *Ibid.*

17. Heirs will be held liable in Virginia upon the debts and covenants of their ancestor binding the heirs, to the extent of real assets descended in another State, if by the laws of that State, they would be liable on such debts and covenants; and a court of equity in Virginia may enforce the liability. *Dickinson v. Hoomes' adm'r et als*, 8 Grat. 353.

18. Under the circumstances of this case the heirs held bound to account for so much of the lands out of the State as they have actually gotten, or may get possession of, with the rents and profits derived therefrom, deducting the costs and expenses of recovering the lands. *Ibid.*

19. In a proceeding to recover damages against the Upper Appomattox Company, under the 9th section of 23d February 1835 sess. acts p. 82, the jury having returned their report ascertaining the damages, and company having excepted to it and obtained a continuance, the plaintiff dies. The proceeding may be revived by the administrator, but not by the heirs. *Upper Appomattox Company v. Hardinge*, 11 Grat. 1.

20. Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title, or authority to enter under a title outstanding in another. *Tapscott v. Cobbs et als*, 11 Grat 172.



## HORSE STEALING.

1. The act 1819. 1 Rev. Code, ch. 152 p. 575, in relation to horse stealing, is repealed by the act the 14th March 1848, ch. 4 § 15. *Lathrop's case*, 6 Grat. 671.

2. Horse stealing is now punishable only as grand larceny. *Ibid.*

---

from.

## HUSBAND AND WIFE.

1. A conveyance by husband and wife of the wife's real estate to a third person, for the purpose of having the same conveyed to the husband and thus transferring the estate to him, is valid. *Shepperson v. Shepperson et als*, 2 Grat. 501.

2. *Choses* in action and other property to which the wife becomes entitled during the coverture, are liable to the claims of the creditors of the husband, and a settlement thereof upon the wife with the assent of the husband before being reduced into possession, will not protect such *choses* or other property from such creditors' claims. *Dold's trustees v. Geiger's adm'r*, 2 Grat. 98.

3. The interest and profits arising from property and *choses* in action, to which the wife, who lives with her husband, and is supported by him, becomes entitled during the coverture, belong to the husband, free from the equity of the wife to a settlement. *Ibid.*

4. The rents and profits of real estate held in actual possession by a coparcener with the wife, belong absolutely to the husband, and he may maintain an action for them, without joining his wife. *Ibid.*

5. Husband and wife convey the equity of redemption in her land to a trustee to sell the same for the use and benefit of the grantors. 1. This is a conversion of the land into personalty. 2. The husband may, in the lifetime of the wife, dispose of the trust property. 3. The husband surviving the wife, the whole trust property, whether land unsold or the proceeds of the land, belong to him. *Siter, Price & Co. v. McClanahan, et als*, 2. Grat. 280.

6. The act authorizing the courts of chancery to restore to the injured party divorced, as far as practicable, the rights of property conferred by the marriage, does not affect the vested rights of creditors or *bona fide* alienees or incumbrancers, which attached upon the property, prior to the institution of proceedings for a divorce; and when the property was the absolute property of the husband. *Jennings et als v. Montague*, 2 Grat. 350.

7. An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditors to be satisfied out of the attached effects,

in preference to the wife, claiming the effects as property brought by her to her husband on the marriage. *Ibid.*

8. A deed by a *feme*, in contemplation of marriage, conveys her property in trust, with intent that it shall be secured from the husband's creditors; he being notoriously insolvent. The court will so construe the deed, consistently with its terms, as will give effect to the leading intent of the parties. *Perkins' trustee v. Dickinson & Co.*, 3 Grat. 335.

9. A guardian and administratrix, who has executed official bonds, makes a settlement with the husband of her ward and the distributee and executes her bond to the husband, for the amount found due on the settlement. The husband afterwards dies, leaving his wife surviving, and the bond remaining unpaid. *Quære*: If this is a reduction of the *chose in action* of the wife into possession by the husband, so that his administrator will be entitled to the debt; or whether it survives to the wife. (The court, consisting of four judges equally divided upon the question.) *Yerby and wife v. Lynch et als*, 3 Grat. 460.

10. A benefit which is secured to a husband, to be enjoyed jointly with his wife and children, cannot be subjected by the creditors of the husband. *Perkins's trustee v. Dickinson & Co.*, 3 Grat. 335. *Mundy v. Vawter et als*, *id.* 518.

11. A *chose in action* is bequeathed to A. for life and remainder to B. the wife of C. A. and C. unite in a voluntary assignment of the *chose* to D. C. survives A., and before the *chose* is reduced into possession by D., C. dies, leaving his wife surviving him. The wife is entitled to the *chose*. *Hayes v. Ewell's adm'r et als*, 4 Grat. 11.

12. *Quære*: If a wife joining with her husband in a conveyance of land as his land, thereby divests herself of her own equitable interest therein. *Heth et als v. Richmond and Fredericksburg R. R. Co.*, 4 Grat. 482.

13. Husband and wife have each an equitable title to one moiety of a tract of land and a patent issues to husband and wife for the land. Under the patent each took the entirety of the tract, with the chance of excluding by survivorship the heirs of the other. *Norman's ex'or v. Cunningham and wife et als*, 5 Grat. 63.

14. Though the legal estate of the whole tract vested in the husband surviving, yet the wife's equitable estate, in an undivided moiety descended to her heirs, subject to the husband's life estate. *Ibid.*

15. It was not competent for the husband, by any act of his, to divest the equitable estate of his wife, and vest it in himself, either absolutely or contingently. *Ibid.*

16. The husband held the legal title to the undivided moiety of his wife, in trust for her heirs. *Ibid.*

17. The husband having sold the land to *bona fide* purchasers, without notice, equity will compensate the heirs of the wife out of the estate of the husband. *Ibid.*

18. *Quære*: Is the measure of compensation, the value at the time of the sale, or at the death of the husband, excluding permanent improvements on the land, made since the sale. *Ibid.*

19. The heirs of the wife are not precluded from claiming the land, by their taking under the will of the husband. *Ibid.*

20. A deed by husband and wife, executed under a power of attorney, is the deed of the husband, though it is void as to her. *Shanks et als v. Lancaster*, 5 Grat. 110.

21. A wife having a power of appointment over land, to be executed by writing under her hand and seal, or by last will and testament, her deed, by which she relinquishes her right in the land, for value, will destroy her power of appointment, though she is not privily examined. *Hume v. Hord et als*, 5 Grat. 374.

22. The wife having the right to give the land to whom she pleases, by the execution of the power of appointment, she has also the right, for value, and with the assent of all persons interested in the land, to destroy the power by the same means. *Ibid.*

The certificate of the clerk that a deed was acknowledged in court by husband and wife, and ordered to be recorded, is not sufficient to make it her deed. *Healy et als v. Rowan et als*, 5 Grat. 414.

24. A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in property which was the wife's at the time of the marriage; and his creditors cannot subject it to the payment of his debts. *Kelly v. Scott*, 5 Grat. 479.

25. Husband during the life of his wife, takes the benefit of the act for the relief of insolvent debtors and surrenders and conveys to the sheriff his interest in his wife's real estate. The sheriff sells and conveys said interest to the purchaser. The purchaser is a tenant for life, and may be sued in an action of waste by the husband and wife. *Dejarnette v. Allen and wife*, 5 Grat. 499.

26. A joint action of assault and battery lies against husband and wife for an assault committed jointly by both. *Roadcap and wife v. Sipe*, 6 Grat. 213.

27. In such an action against husband and wife for a joint assault, there may be a verdict and judgment against the one and in favor of the other. *Ibid.*

28. A deed executed by a woman, a few days before her marriage, to secure a debt due to her daughter by a former marriage, held to be valid against the husband. *Fletcher and wife v. Ashley et als*, 6 Grat. 332.

29. A conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect in possession until his death, and though he reserves the power to sell and re-invest or account, and also the power to re-appoint among specified objects is valid to bar the wife of her distributable share therein. *Gentry et als v. Bailey*, 6 Grat. 594.

30. Where a wife acts in furtherance of a combination to commit a felony, in the presence of her husband, she will be presumed to have acted under his coercion. But if the circumstances show that she was not acting under coercion, but of her own free will, she is accountable for her own acts. *Uhl et als' case*, 6 Grat. 706.

31. Husband sells wife's remainder in slaves for value, and dies leaving his wife surviving him, before the life tenant. The wife is entitled to the slaves as against the purchaser from the husband. *Moore v. Thornton et als*, 7 Grat. 99.

32. Though the purchaser buys the interest of the life tenant also, yet if the husband dies leaving the wife surviving him, she is entitled. *Ibid*.

33. There being a charge upon the property of the wife, a part of which is in possession and sold so as to vest in the purchaser, the charge must be borne ratably by the purchaser and the wife. *Ibid*.

34. The husband of a legatee of a life interest, which terminates by the death of the legatee, before a decree to subject them for a *devastavit* of their testator, is not liable for the life estate so terminated. *Sheldon et als v. Armistead's ad'mr*, 7 Grat. 264.

35. A postnuptial settlement made by a husband on his wife, of personal property derived from her father's estate, but of which he retains the possession, not having been properly recorded, is void as against the creditors of husband. *Lewis et als v. Carpenter's ex'or et als*, 8 Grat. 148.

36. A deed made by a husband, embarrassed at the time, by which he conveys the proceeds of his wife's land which had been sold, and the note for the purchase money made to him, in trust for himself and wife for their lives and the life of the survivor, and during his life to be under his control and management, is fraudulent and voluntary as to his creditors. *Ibid*.

37. The declaration of the wife at the time she executes a deed, or at other times, that she has executed or does execute the deed, because her husband had promised he would settle, or because he had settled upon her certain property derived from her father's estate, is not sufficient evidence

of a contract between them for such a settlement, in consideration of her relinquishment of her right of dower in her husband's lands; and thus to support such a settlement, if made, against creditors and incumbrancers, even to the extent of a reasonable compensation for the right of dower which she relinquished. *Ibid.*

38. *Quære*: If the wife's relinquishment of her contingent right of dower in land, where there is no complete alienation of the estate by the husband, but a mere incumbrance for the security of a debt, constitutes a sufficient consideration for a settlement on the wife. *Ibid.*

39. *Quære*: If the certificate of the privy examination of a *feme covert*, made under the act of 1792, which purports in the body to be under the seals of the justices, when in fact, no seals or scrolls are affixed to their names, is valid to bar the *feme*. *Bryan v. Stump &c.*, 8 Grat. 241.

40. A wife's interest in her father's estate, in the hands of the executor, may be subjected by a creditor of the husband by a proceeding by foreign attachment, where the husband resides out of the State. *Vance v. McLaughlin's adm'r*, 8 Grat. 289.

41. Though the service of the process upon the executor creates a lien upon the wife's interest, in favor of the creditor, yet if the husband dies pending the proceedings, leaving the wife surviving him, the lien of the creditor is defeated and the property belongs to the wife. *Ibid.*

42. The rights of the husband to the property of his intended wife may be intercepted by his agreement to that effect; and where by express contract before and in contemplation of marriage, for which the marriage is sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach, during the coverture or after the death of his wife. In such case, the wife is to be regarded to all intents as a *feme sole* in respect to such property and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass, as if the wife died sole and intestate. *Charles v. Charles*, 8 Grat. 486.

43. If the husband has relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate. *Ibid.*

44. Property conveyed in trust by a husband, for himself and wife, by deed not duly recorded, is sold under a decree at their suit against the trustees, and conveyed by deed duly recorded. It is a valid sale against a creditor of the husband, subsequent to the deed. *Glazebrook's adm'r v. Ragland*, 8 Grat. 332.

45. Upon a joint indictment against husband and wife for selling ardent spirits, if they are convicted, there must be judgment for a separate fine against each. *Hamor and wife's case*, 8 Grat. 698.

46. In a case of *habeas corpus*, to obtain possession of a child by a mother, the father being dead, the petition may be in the name of the mother and a second husband. *Armstrong v. Stone and wife*, 9 Grat. 102.

47. In order that marriage may form a sufficient consideration to protect a voluntary conveyance against creditors, the marriage must take place before the creditors obtain a judgment. *Fones v. Rice et als*, 9 Grat. 568.

48. A father in consideration of affection and of one dollar paid him by herself and husband, conveys to his daughter for the use of herself and her husband and their joint heirs, several slaves; to have and to hold the slaves to the daughter and her husband and their heirs &c.; and he warrants the title to them. The deed conveys to the daughter and her husband a joint estate; and the husband may dispose of the slaves. *Cleland v. Watson*, 10 Grat. 150.

49. A deed from a husband to his wife, conveying to her all his property, real and personal, under circumstances showing a strong meritorious consideration, set up in equity against a nephew, the heir at law of the grantor. *Jones and wife v. Obenchain et als*, 10 Grat. 259.

50. A husband is not a competent subscribing witness to a deed by which real estate is conveyed to his wife, during the marriage, either for the purpose of proving due execution of the deed, when called in question, or for the purpose of having it recorded. *Johnston and wife v. Slater et als*, 11 Grat. 321.

51. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar of, and in full consideration for her dower. This agreement barred her of dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate. *Findley's ex'or v. Findley*, 11 Grat. 434.

52. The widow, having renounced the will, is not entitled to take under it, the property bequeathed to her; but it is to be applied to compensate the legatees who were disappointed by her taking her distributable share of the personal estate. *Ibid.*

53. The widow having received from the executors two bonds of her son by a former marriage, which he had executed to her husband, in part satisfaction of what was due to her under the marriage agreement, and having given them a receipt for the amount, it is a valid payment to her to that extent. *Ibid.*

54. When the statute of limitations runs against a *feme covert* and her husband, so as to bar a recovery during the coverture. *Caperton et als v. Gregory*, 11 Grat. 505.

SEE MARRIAGE SETTLEMENT ; DEEDS ; WASTE ; DOWER.

---

### INDEMNIFYING BOND.

1. One indemnifying bond may be taken on several executions. *Davis v. Davis*, 2 Grat. 363.

2. It is not necessary to set out the executions in an indemnifying bond. *Ibid.*

3. A firm being plaintiff in the execution, the bond, executed by one of the firm in the partnership name, is a good bond of the party so executing it. *Ibid.*

4. The reciting the names of the plaintiffs in the execution by their partnership name is sufficient. *Ibid.*

5. In an action on an indemnifying bond, the relator claims title to the property sold, under a sale by deed, made by one partner, without the knowledge or consent of the other, of partnership property. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration of his ownership of the property. *Forkner v. Stuart &c.*, 6 Grat. 197.

---

### INDENTURES.

SEE APPRENTICES.

---

### INDICTMENT, INFORMATION, AND PRESENTMENTS.

1. In an indictment for selling ardent spirits to slaves, it is not necessary to state the names of the owners of the slaves, to whom the liquor was sold. *Smith and Burwell's case*, 1 Grat. 553.

2. In an indictment against the overseer of a road, for not keeping it in repair, it is not necessary to allege that the county court had not by an order, entered of record, authorized a less width than thirty feet. *Howard's case*, 1 Grat. 555.

3. Defective indictment for perjury, quashed upon demurrer. *Roach's case*, 1 Grat. 561.

4. An indictment for perjury, in swearing to an answer, should set forth the whole bill and answer. *Lodge's case*, 2 Grat. 579.

5. An indictment for removing a slave to another county, with intent to defraud the owner and deprive him of his property, is fatally defective, even after verdict, in omitting to charge that it was without the consent of the owner. *Pea's case*, 2 Grat. 629.

6. The act of *Jeofails* of 1804, examined and explained by Lomax, Judge. *Ibid.*

7. An indictment against a jailor for permitting a prisoner, in his custody, to have an instrument in his room with which he might break the jail and escape, and for failing carefully to examine, at short intervals the condition of the jail and what the prisoner was engaged at in said jail, in consequence of which the prisoner escaped, does not state an indictable offence. *Connell's case*, 3 Grat. 587.

8. An information under the 3d section of the act March 3d 1840, in relation to the sale of spirituous liquors, must contain an averment that the person selling had not a license to sell spirituous liquors. *Hampton's case*, 3 Grat. 590.

9. An indictment upon a statute must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it. *Ibid.*

10. If an indictment for felony includes offences for which the prisoner has not been tried, and sent on by the examining court for further trial, it is error and the court should, upon the motion of the prisoner, quash the counts of the indictment which charge these offences. *Clere's case*, 3 Grat. 615.

11. The common law rule that one good count in an indictment will sustain a general verdict of guilty, is overruled in Virginia, as to penitentiary offences. *Ibid.*

12. An indictment for murder states that the mortal wound was inflicted on the 7th November, 1845, that the deceased languished until the 8th November in the year aforesaid, and then says, "on which said 8th of *May* in the year aforesaid the deceased died." The prisoner pleads not guilty. Held: that the insertion of May for November is a mistake apparent on the face of the indictment and will not exclude proof of the death subsequent to the 7th of November or be cause for arresting the judgment. *Ailstock's case*, 3 Grat. 650.

13. A presentment for unlawful gaming by playing at cards, and betting on the sides and hands of those that then and there did play, is not objectionable on the ground of duplicity. *Tiernan's case*, 4 Grat. 545.

14. An indictment is defective for omitting the conclusion "against the peace and dignity of the Commonwealth." *Carney's case*, 4 Grat. 546.



## INDICTMENTS—INFORMATIONS AND PRESENTMENTS.

15. In a proper case the Court may permit an information to be amended after a demurrer thereto; but this should not be done where the facts charged in the presentment, on which the information is founded, do not amount to a misdemeanor. *Matthew Williamson's case*, 4 Grat. 554.

16. An indictment which charges that defendant knowingly and wilfully removed a fence from the land of P.; and did injure and expose the growing crop then on said land, charges but one offence, and is valid. *Ratcliffe's case*, 5 Grat. 657.

17. In indictments for statutory offences the language of the statute defining the offence, should be strictly followed. *Howell's case*, 5 Grat. 664.

18. In an indictment under § 4, ch. 160, 1 Rev. Code, p. 587, it is not sufficient to use the words "set fire to" the house; but the word "burn" must be used; that being the word employed in that section of the act to define the offence. *Ibid.*

19. An indictment for selling ardent spirits without a license may charge the sale to two persons. *Peer's case*, 5 Grat. 674.

20. A count under § 17 act March 7, Sess. Acts, 1834, p. 7, and a count under § 3 of the same act, may be joined in the same indictment. *Ibid.*

21. Although the terms of the act are, "license and certificate," yet if the indictment allege the sale without license, omitting the words "and certificate," the indictment is good upon demurrer. *Ibid.*

22. A proviso in a statute must be insisted on for purposes of defence by the defendant, but where there are exceptions in the enacting part of the law, it must be charged that the defendant does not come within any of them. *Hill's case*, 5 Grat. 682.

23. It is not necessary to notice in an indictment the provisos of a statute, although the purview should expressly notice them. *Ibid.*

24. An indictment under § 3, ch. 2, Sess. Acts, 1839-'40 is good, though it does not negative the exceptions contained in the provisos, in § 4 of said act. *Ibid.*

25. A wrong name, inserted in an indictment for misdemeanor, cannot be amended by the insertion of the right name, though the record of the Court and the endorsement on the indictment show the right name. *Buzzard's case*, 5 Grat. 694.

26. An indictment under the statute, 1 Rev. Code, ch. 111, § 13, p. 424, for allowing more than five slaves to be and remain at one time on the defendant's premises, need not charge that it was without the consent of the owners of the slave. *Foster's case*, 5 Grat. 695.



27. An indictment for that, H. without having a license therefor, according to law did on, &c., at &c., in said county sell by retail, wine, &c., not to be drank where sold, against the peace and dignity of the Commonwealth, is a good indictment. *Hatcher's case*, 6 Grat. 667.

28. An indictment quashed, because a grand-jurer was not a freeholder, is not a sufficient foundation for a rule against the party to show cause why an information should not be filed against him. *Ayre's case*, 6 Grat. 668.

29. An indictment for an attempt to commit an offence, ought to charge some act done by the defendant of such a nature as to constitute an attempt to commit the offence. *Clark's case*, 6 Grat. 675.

30. Motions to quash indictments and informations should not be encouraged, and that mode of proceeding is not to be extended further than is authorized by the cases; but a party should be left to his demurrer, motion in arrest of judgment, or writ of error. *Litton's case*, 6 Grat. 691. *Lodge's case*, *id.*, 699.

31. On an information for perjury, the attorney for the Commonwealth allowed to amend the information in accordance with the presentment on which it is founded, after the appearance of the defendant and motion by him to quash the information. *Lodge's case*, 6 Grat. 699.

32. Form of indictment, for attempting to burn a barn, under § 12, ch. 11, Sess. Acts 1848, sustained by Court of Appeals. *Uhl et al's. case*, 6 Grat. 706.

33. In an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to that on which the statute punishing the offence went into operation, but as continuing to a day after the commencement of the act. The indictment is good. *Nichols and James' case*, 7 Grat. 589.

34. In an indictment for retailing ardent spirits without a license, to be drank where sold, it is not error to use the word "or," in speaking of the various kinds of spirituous liquors charged to have been sold. *Morgan's case*, 7 Grat. 592.

35. Two persons may be jointly indicted or proceeded against by information, for retailing ardent spirits without a license. *Harris and Hickman's case*, 7 Grat. 600.

36. An indictment for arson, according to the form at common law, which omits to allege whether the act was committed in the day or night time, is sufficient for a case of arson, in which the jury find a verdict that the offence was committed in the day time. *Curran's case*, 7 Grat. 619.

37. For the offence of burning at night, it seems that the indictment must charge a burning in the night time. *Ibid.*

38. The attorney for the Commonwealth, may have a rule against a defendant to show cause why an information should not be filed against him, though at a previous term the defendant had been summoned in answer the presentment, which was defective because of the omission of the words, "against the peace and dignity of the Commonwealth of Virginia;" and the Court should not after the filing of the information quash the presentment because of this defect. *Christian's case*, 7 Grat. 631.

39. The issuing process against the defendant to answer the presentment at a previous term, furnishes no reason against granting leave to file an information at a subsequent term. *Ibid.*

40. In an indictment for the forgery of a negotiable note, it is not necessary to set out the endorsements upon it. *Perkins' case*, 7 Grat. 651.

41. In an indictment for malicious trespass, it is not error to omit the words of the statute, "but not feloniously." these words not constituting any part of the description or definition of the offence. *Dye's case*, 7 Grat. 662.

42. An indictment having been quashed upon a demurrer to a defective replication to a plea, another indictment may be found for the same offence without another trial before the examining Court. *Souther's case*, 7 Grat. 673.

43. *Quære*: If the statement in the commencement of an indictment, of the name of the Court and of the term at which the indictment is found, is not surplusage. If not surplusage, it is useless. *Bell's case*, 8 Grat. 600.

44. When the indictment in the caption names one county, and in the body speaks of the prisoner as of another county, the charging the offence to have been committed "in the county aforesaid" is error; it not being alleged with sufficient certainty that the offence was committed in the county in which the indictment was found. *Ibid.*

45. An indictment for perjury must show that the evidence which the defendant gave was material; and therefore if the evidence which the defendant gave before the grand-jury is not shown clearly on the face of the indictment, to relate to an offence committed within the county, the indictment is defective. *Pickering's case*, 8 Grat. 628.

46. What allegations constitute a good indictment for attempting to commit a felony. *Nutter's case*, 8 Grat. 699.

47. In a prosecution under the Act, Code ch. 199, § 25, p. 752, in order to subject a prisoner to the additional imprisonment prescribed, upon a second conviction for a felony, the indictment must set out the time and place of the first conviction, and must also allege that the prisoner's conviction was for an offence committed before the commission of that for which the prisoner is on trial. *Rand's case*, 9 Grat. 738.

48. *Quære*: Whether each count in the indictment must set out the former conviction, or whether one statement of that fact may be made applicable to all the counts. *Ibid.*

49. In criminal proceeding, the same defects or imperfections of form may be taken advantage of on a general, as on a special demurrer. *La-zier's case*, 10 Grat. 708.

50. In an indictment for murder, there are two counts, in the second of which the offence is not set out as another offence. This is not error.\* *Ibid.*

51. An indictment for murder charges the wound to have been inflicted on the 9th of December, and goes on to allege that the deceased died of said wound on "the aforesaid 14th of December." The word "aforesaid" is surplusage, and its insertion is not a fatal defect. *Ibid.*

52. In an indictment for murder, it is not necessary to set out the length or breadth of the wound.\* *Ibid.*

53. It is not error in an indictment, that dates are set out in figures instead of in words. *Ibid.* & *Cady's case*, *id.*, 776.

54. A presentment for selling ardent spirits to be drank at the place where sold, without having first obtained a license to keep an ordinary, describes the defendant as a free negro. This description is surplusage, *Scott's case*, 10 Grat. 749.

55. On a prosecution for uttering and attempting to employ as true, a forged note, purporting to be the note of a bank in another State, it is surplusage to state that the bank was authorized by the laws of that State; and need not be proved. *Cady's case*, 10 Grat. 776.

56. An indictment for selling by retail, ardent spirits, to be drank where sold, must set out the place in the county where the sale is made. It is not sufficient to allege that the sale was made in the county. *Head's case*, 11 Grat. 819.

57. The words "to the prejudice of another's right" in the Code, ch. 193 § 5, p. 733, in relation to forgeries are descriptive not of the offence, but of the writings, of which forgery may be committed; and it is not, therefore, necessary that they shall be inserted in the indictment in describing the offence. *Powell's case*, 822.

58. The maker of a negotiable note passes it to the payee, with the name of a third person endorsed upon it; which name he forged. The forging of the name endorsed upon the paper constitutes the offence of forgery. *Ibid.*

\* See Code, p. 770, § 10.

59. The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment, though the simulated liability may not be that of a technical endorser, but of a different character. *Ibid.*

See CRIMINAL JURISDICTION AND PROCEEDINGS.

---

INFANTS.

1. At common law an infant may make a contract of enlistment in, the United States Army, which will bind him, without the consent of his parent or guardian. *United States v. Blakeney*, 3 Grat. 405.

2. Under the act May 13th 1846, for the prosecution of the war with Mexico, an infant who enlisted in one of the companies of volunteers, authorized by that act, without the consent of his father, is bound by his contract. *Ibid.*

3. Same principles decided as the case above. *United States v. Lipscomb*, 4 Grat. 41.

4. Marriage articles between an infant *feme* and her intended husband, beneficial to her and her contemplated issue, are obligatory upon both parties, and will be enforced in a Court of Equity by a settlement in conformity therewith on the application of the issue of the marriage. *Healy et als. v. Rowan et als.*, 5 Grat. 414.

5. Marriage articles entered into between guardians of an infant *feme* and her intended husband, to which she is not a party, are of no obligatory force upon her. *Ibid.*

6. An infant *feme* may, after she obtains her full age, and when *sui juris*, adopt and ratify a marriage agreement made for her by her guardians. *Ibid.*

7. A second guardian of an infant has no authority to file a bill in his own name, against a former guardian for an account of his transactions in relation to the wards estate. *Lemon, guardian v. Hansbarger*, 6 Grat. 301.

8. An infant may by his next friend, call the acting guardian or any preceding guardian to account, by a bill in Chancery; but the bill must be in his own name by his next friend. *Ibid.*

9. Equity has power to sell infant's lands unless the testator has expressly prohibited a sale. *Talley et als. v. Starke's adm'r et als.*, 6 Grat. 339.

10. In such a case a guardian *ad litem* may be appointed at rules. *Ibid.*

11. It is not necessary in a decree for the sale of the land to direct that the guardian shall give security under § 20, of the act 1. Rev. Code, chap. 108, p. 409-10. *Ibid.*\*

12. The mother of a child, whose father is dead, is *prima facie* entitled to its custody, and a *habeas corpus* for the possession of the infant may be sued out, either by the infant or by his next friend, or by the party claiming the possession. *Armstrong v. Stone and wife*, 9 Grat. 102.

13. The right of the mother in such a case is not affected by a second marriage, and she may sue out a *habeas corpus* for the infant in the name of her husband and herself, but the Court has a right, in the exercise of its discretion, to say whether the child shall be confided to her custody. *Ibid.*

14. The act 1 Rev. Code, 1819, ch. 19, § 20, Sup. R. C., ch. 149, § 2, authorizing the sale of lands, where the interest of each joint-owner is less than \$300, refers to the estimated value of each interest if the land is divided, and not the value of each interest in the estimated value of the whole. *Parker et als. v. McCoy, et als.*, 10 Grat. 594.

15. If the value of each interest in the land, when divided in kind, is less than \$300, the Court has authority, under the statute, to sell the land, though the estimated value of the whole land, will give to each owner more than \$300. *Ibid.*

16. The land in possession of a widow for life, as her dower, need not be estimated in ascertaining the value of the infant's interest in the lands, but the land in possession of the infants may be valued, and if of less value than \$300, to each, may be sold without selling the land in possession of the widow. *Ibid.*

17. It is not necessary to summon the infant owners in a proceeding to sell their land under this statute, but the Court may appoint a guardian *ad litem* to defend them. *Ibid.*

18. In the proceeding under this statute, the order or decree of the Court is conclusive upon the infant; and he has no day in Court to show cause against it, upon his coming of age. *Ibid.*

19. Though the final decree in the proceedings gives the infant a day in Court, upon the coming of age, this will not entitle him as against a *bona fide* purchaser of the land under a decree of the Court, to disturb the sale. *Ibid.*

20. Though the proceeding under this statute may be, and usually is, by bill, it is not necessarily so, but may be by petition or motion; and the parties being summoned, the evidence may be heard in Court and the necessary orders and proceedings may be had therein. *Ibid.*

\* See Code, ch. 128, § 7, p. 536; Acts '52-3, p. 50, and Acts 1850, p. 13.

21. Though the defendant was an infant at the time a suit was instituted against her, yet if she did not set up her infancy to defeat the action, and it may be reasonably inferred from the evidence, that she was of full age when the cause was tried, and she appeared and defended herself by counsel, she is bound by the judgment. *B. Staton v. Pitman, sh'ff.*, 11 Grat. 99.

22. The statute of limitations applying to lands west of the Alleghany Mountains,\* construed as to the rights of infants. *Caperton et als. v. Gregory et als.*, 11 Grat. 505.

See GUARDIAN AND WARD.

---

## INJUNCTIONS.

1. A person having borrowed money on usurious interest, procures the bond of a third person, which he transfers to his creditor in part discharge of the usurious debt, and executes his own bond for the same amount, with a deed of trust to secure it. Afterwards the usury creditor requiring the payment of the bond transferred to him, the obligor in that bond directs a sale of the trust property. Equity will enjoin him from such proceeding; and if the usurious creditor attempts to enforce the payment of the bond transferred to him, will enjoin him from such proceeding. *Cabaness v. Matthews et als.*, 2 Grat. 325.

2. The fraud of a maker of a note, by which he induces his surety to sign it, of which the payee has no knowledge, does not entitle the surety to relief against the innocent payee or holder. *Griffith et als. v. Reynolds*, 4 Grat. 46.

3. A testator died leaving a widow surviving him; by his will, he devised a moiety of certain lands to J. B. who sold his interest for \$1000. There being an after-born child, and the widow's dower being unequally assigned in other lands, and suit brought for the child's portion, and to have the widow's dower re-assigned, the purchaser of J. B.'s interest may, enjoin the collection of the purchase money, until the extent of the incumbrances are ascertained. *Price v. Browning*, 4. Grat. 68.

4. Ten per cent. damages are not to be allowed during the pendency of an appeal against the decree of the Court below dissolving an injunction. *Jeter v. Langhorne*, 5 Grat, 193.

5. On a bill filed to enjoin a judgment on the ground that the debt on which it was founded, was for money won at cards, it being doubtful, on the evidence, whether such was the consideration, or, if it was, whether the plaintiff in the judgment had not been induced by the concealment or

\* Sess. Acts, 1836-'7, p. 11, § 10.

misrepresentation of the debtor to take a transfer of the debt, the Court should continue the injunction and direct an issue to ascertain the facts. *Nelson's adm'r v. Armstrong et als.*, 5 Grat. 354.

6. A judgment at law enjoined, on the ground of mistake of the jury, ascertained by after-discovered evidence. *Rush et als. v. Ware*, 6 Grat. 50.

7. Upon a motion to dissolve an injunction, before answer of the defendant, all the allegations of the bill must be taken as true. *Peatross v. McLaughlin*, 6 Grat. 64.

8. A judgment debtor having obtained his discharge as a bankrupt, subsequent to a judgment, may enjoin the suing out or levying of any execution on said judgment. *Ibid.*

9. Where an administrator, with the will annexed, resorts to equity to establish and enforce claims against his testator's estate, and to set aside conveyances made by him, he places his whole trust and authority under control of the Court, and he will be restrained by injunction from proceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee or legatee. *Watson v. Fletcher*, 7 Grat. 1.

10. When the title to land is clearly defective as to part, the purchaser may enjoin the collection of bonds assigned in payment of the purchase money. *Clarke v. Hardgrove, &c.*, 7 Grat. 399.

11. An injunction to a judgment at law, not showing equity on its face, dissolved, without answer, as improvidently awarded. *Slack v. Wood*, 9 Grat. 40.

12. Pending a bill for an injunction to a judgment, and for a rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff. *Young's adm'r v. McClung, et als.*, 9 Grat. 336.

13. But if vendee might have obtained relief by supplemental bill or petition in another pending suit, he shall not have costs. *Ibid.*

14. In an action at law, the defendant is prevented by unavoidable accident from making defence and setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debts sued upon; he has however a plain remedy at law or in equity for the recovery of his claims. He is not, in equity, entitled to enjoin the judgment, and set up his offsets against it; but must pursue his remedy for their recovery. *Hudson v. Kline* 9 Grat. 379.

15. A purchaser of land coming into Court of Equity, to enjoin a judgment for the purchase money on the ground of defect in the title, though



the title is afterwards perfected, is entitled to his costs, and the injunction is to be dissolved without damages. *Reeves v. Dickey*, 10 Grat. 138. *Jaynes et al. v. Brock*, *id.* 211.

16. An injunction refused by a judge of a Circuit Court, is presented to a judge of the Court of Appeals, who also refuses it, it may be granted by another judge of the Court of Appeals. *Jaynes et al v. Brock*, 10 Grat. 211.

17. A party claiming that he has not been credited for all money paid by him to the sheriff on an execution, may have any injustice done him corrected by the Court, from whence the execution issued; and it is not a case for an injunction and relief in equity. *Morrison v. Speer*, 10 Grat. 228.

18. Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgment and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale. *Moore et als. v. Holt*, 10 Grat. 284.

19. Though the owner of lands has the legal title and may maintain trespass, yet equity has jurisdiction, and may enjoin another party who claims the lands from taking iron ore from it. *Anderson v. Harvey's heirs*, 10 Grat. 386.

20. An injunction to a judgment at law will not be sustained, to allow the defendant at law to set up payments or set-offs, which he might have pleaded at law; and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law; or he should have filed interrogatories to the plaintiff under the statute. *George v. Strange's ex'or*, 10 Grat. 499.

21. An injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defence at law from ignorance of the nature of the proceeding against him, and a misapprehension of the steps necessary to be taken, in order to subject him. *Meem v. Rucker*, 10 Grat. 506.

22. The mere averment by a plaintiff, in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse for not defending himself at law, is not sufficient. He must prove them. *Ibid.*

23. An injunction to inhibit the sale of property by trustees, is not a bar to their bringing an action at law to recover the trust property; and even if they are guilty of a contempt that is to be redressed by the Court of Chancery acting upon the parties, and will not prevent the maintenance of the action at law. *Nichols v. Campbell*, 10 Grat. 560.

24. W. made a verbal agreement to S. for the sale of a lot to him. S. sold to A., who received a deed for the lot from W. with general warranty and executed his bonds to S. for a balance of the purchase money. At the time of the sale to A., the lot was made more valuable by a change in a street which was afterwards returned to its original location by the town authorities. S. having made no representation to A., having been guilty of no fraud and having made no warranty of title is not liable to A. for the damage he has sustained, and A. cannot enjoin the collection of the purchase money. *Price's ex'ors v. Ayres*, 10 Grat. 575.

25. The damages upon the dissolution of an injunction to a judgment, become, as to the party obtaining the injunction, a part of the judgment and embraced in the lien of the judgment. *Michaux's adm'r v. Brown et als.*, 10 Grat. 612.

26. The pendency of an injunction to a judgment at law, will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the judgment on the *scire facias* to restrain the issue of an execution thereon. *Richardson's adm'r v. Prince George's justices*, 11 Grat 190. *Poindexter's adm'r v. Same, id.*

27. A defendant in an execution files a bill to enjoin it, on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution sufficient to discharge it. In such a case the bill must be filed in the county where the judgment was removed, and the Circuit Court of another county has no jurisdiction. *Beckley v. Palmer et al.*, 11 Grat. 625.

28. In such a case it is not necessary that the objection to the jurisdiction shall be taken by demurrer or plea; but it may be taken at the hearing of the cause. *Ibid.*

29. If in such case the plaintiff insists that the sheriff has misapplied the proceeds of the property levied on, or that a payment has been made to him, which has not been credited on the execution, if he had an opportunity to apply to the Court of law from which the execution issued for redress, he has no right to come into a Court of Equity for relief. *Ibid.*

See EQUITABLE JURISDICTION AND RELIEF.

---

## INQUISITION.

1. If a party applying for leave to build a mill owns the land on only one side of the stream, the proceedings should be under the 1st., 2d., and 3d. sections of ch. 235, 2 Rev. Code; and if in such case he proceeds under the 4th section of the act, the Court should quash the writ and inquisition. *Whitworth and wife v. Puckett*, 2 Grat. 528.

2. If it appears upon the hearing of the cause that a greater quantity of land of the adjoining proprietors will be overflowed by the erection of the dam, than the jury estimated, the Court should quash the inquisition and direct a new writ. *Ibid.*

3. Upon a motion to quash a writ and inquisition founded on a judgment at law, which motion is sustained, the writ and inquisition are a part of the record, though no bill of exceptions is taken, and will be so treated by an appellate Court. *Wallop's adm'r v. Scarborough et als.*, 5 Grat. 1.

4. The motion to quash in such case must be in the name of and against a party to the record. *Ibid.*

5. A person who signed a petition to the legislature for the establishment of a ferry, is not thereby rendered incompetent to act on the jury of inquest. *Somerville v. Wimbush*, 7 Grat. 205.

6. Upon an application to build a mill, where the requirements of the statute are substantially fulfilled in the inquisition it is sufficient. *Mairs v. Gallahue*, 9 Grat. 94.

7. If the petition or order of the Court, directing the writ of *ad quod damnum*, does not specify the height of the dam proposed to be erected, it is proper for the jury to specify it in the inquisition. *Ibid.*

8. The statute does not require the writ of *ad quod damnum* to be returned to the next Court after it is awarded; and if the order awarding it, so directs, the direction is merely directory to the officer and his failure to make the return within the time prescribed will not affect the validity of the inquest properly taken. *Ibid.*

---

## INSOLVENT DEBTORS.

1. A Court Equity will at the suit of a creditor of an insolvent debtor, pursue property, the avails of his labor, in the hands of parties uniting with him to screen the same from his creditors; or in the hands of volunteer purchasers from them. *Commonwealth v. Ricks, &c.*, 1 Grat. 416.

2. A sale by a sheriff of an equity of redemption in lands, surrendered by a debtor in execution, upon his taking the benefit of the act for the relief of insolvent debtors is legal. *Tiffany v. Kent et als.*, 2 Grat. 231.

3. *Quære*: If a purchaser at such sale is not bound to pay the amount stated at the sale to be due upon the incumbrance. *Ibid.*

4. Upon taking the oath of insolvency, all the property and rights of the insolvent debtor are vested in the sheriff, who as representing the creditor, is entitled to assert his legal and equitable rights and to set aside fraud-

lent conveyances of the insolvent and recover the property for the benefit of the creditor. *Clough &c., v. Thompson*, 7 Grat. 26.

5. The law does not permit the sale of the goods, chattels and estate of an insolvent debtor in the possession of a third person, until the same shall have been recovered in the mode prescribed by the statute. *Ibid.*

6. The sheriff who is the trustee for all interested in the estate of an insolvent debtor, is not justified in selling the interest of the debtor in the estate surrendered in the schedule or vested by law in the sheriff, when owing to alleged incumbrances, the validity of which is controverted, or the extent of which is uncertain, the property is not in condition to bring its full value. *Ibid.*

7. The real estate of an insolvent debtor vests in the sheriff of the county in which the land lies and a sale thereof by the sheriff of the county in which the oath of insolvency is taken by the debtor, unless the land lies in his county, is without authority and void. *Ibid.*

8. Debts due to the insolvent debtor, and slaves and other personal property, not in possession of the sheriff, or in such a condition that he cannot take possession without process, can not be sold by him so as to vest the legal title in the purchaser. *Ibid.*

9. Where a variety of property is embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, is a violation of duty on the part of the sheriff, and the purchaser at such sale, if he acquired the legal title, would in a Court of Equity, be treated as a trustee for the benefit of those interested. *Ibid.*

10. To a bill to set aside fraudulent conveyances, made by an insolvent debtor, the trustees, *cestuis que trust* in the deed, the sheriffs of the counties in which the lands lie and the execution creditors interested in the property should be parties. *Ibid.*

11. What arrangement of property by a debtor is fraudulent as to his creditors, so as to vest it in the sheriff upon the debtors taking the oath of insolvency. *B. Staton v. Pittmann sheriff*, 11 Grat. 99. *Pittmann sheriff v. B. Staton id.*

12. Though the insolvent debtor never had possession of the property, but it was transferred by a fraudulent arrangement to a third person, the sheriff may recover the property from this third person. *Ibid.*

13. Testator gives his estate to executors for the benefit of his son, and whenever they deem it prudent, they are directed to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate equity will compel them to turn over the estate to him, and from the time of such declaration, the son has such an interest in the

estate that it is subject to his debts, and the interest will vest in the sheriff upon the sons taking the oath of insolvency. *Cochran v. Parish et als*, 11 Grat. 348.

---

## INSTRUCTIONS.

1. It is error in the Court to instruct the jury on the sufficiency of the evidence to maintain the issue. *M'Kinley sh'ff. v. Ensell et als.*, 2 Grat. 333.

2. An instruction as to the sufficiency of evidence, upon a point which is immaterial, is no error for which an appellate Court will reverse a judgment. *Pitman v. Breckenridge and Crawford*, 3 Grat. 127.

3. An exception to a part of a deposition does not designate the part excepted to; but it is brought to the notice of the Court and acted on by the Court, and read under an instruction applicable to it. The objection to the form of the exception does not arise. *Charlton v. Unis*, 4 Grat. 58.

4. In a joint action of trespass against several, who plead jointly, and against whom the jury find a joint verdict, it is error in the Court to instruct the jury that they may sever the damages, and assess respectively whatever in their opinion, each party found guilty ought to pay. *Crawford v. Morris*, 5 Grat. 90.

5. In such case the jury should assess against all who are found guilty the amount which they think the most guilty ought to pay, and therefore an instruction to the jury that they may sever the damages is not an error of which a defendant can complain in an appellate Court, though the plaintiff may. *Ibid.*

6. An instruction given on one trial should not be brought before the jury on a second trial unless asked for by the party who wishes to use it. *Ibid.*

7. If a party be allowed to use it without asking for the instruction, the appellate Court will reverse the judgment, if the instruction was erroneous. *Ibid.*

8. An erroneous instruction having been given in the Court below, the judgment must be reversed and a new trial awarded, and the appellate Court can not consider whether the verdict and judgment are right, notwithstanding the instruction. *Wiley et als. v. Givens et als.*, 6 Grat. 277.

9. If there is any evidence before a jury tending to prove a case supposed, in an instruction asked for, and the instruction propounds the law correctly, it should be given. *Hopkins, Brother & Co. v. Richardson*, 9 Grat. 485.

10. An instruction which is not relevant to the evidence in the cause, or which is only relevant to written evidence which does not authorize it, and which it is the province of the Court to construe properly refused. *Johnson's ex'x v. Jennings' adm'r*, 10 Grat. 1.

11. In ejectment, the Court of Appeals having decided that certain evidence is insufficient to establish an adversary possession, upon a second trial, the evidence being substantially the same, the party, in whose favor the decision is, is entitled to have an instruction to the jury to disregard all the parol evidence introduced for the purpose of proving the adversary possession. *Pasley v. English*, 10 Grat. 236.

12. The evidence of the adversary possession being to be disregarded, it is error to instruct the jury that if such evidence proves an adversary possession of twenty years, under claim of title, the party is entitled to recover. *Ibid.*

13. If an instruction is given on an abstract question which may mislead the jury, it is an error for which the judgment will be reversed. *Ibid.*

14. An instruction given by the Court, which upon the statement of the evidence, given by the party excepting could not be injurious to him, is no ground for reversing the judgment. *Calvin v. Minifie*, 11 Grat. 87.

15. An exception to the opinion of the Court refusing an instruction asked for, does not state the facts of the case so as to show its relevancy. The appellate Court will not undertake to decide whether the Court below did right or wrong in refusing the instruction. *Fitzhugh's ex'or v. G. Fitzhugh*, 11 Grat. 300.

16. The Court may refuse to give an instruction, because it is so obscurely expressed as to leave doubt of the meaning intended. *Levasser v. Washburn*, 11 Grat. 572.

17. Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the Court may properly overrule the motion, without undertaking to state to the jury which is and which is not legal. *Kincheloe v. Tracewells*, 11 Grat. 587.

18. The Court should refuse to give an instruction where it is obscure and calculated to mislead the jury, or where it asks the Court to decide upon a fact in issue in the cause or where it is irrelevant or not applicable to the evidence. *Ibid.*

19. If there is any evidence in a cause, however slight, to which an instruction is applicable and it propounds the law correctly, it is to be given. *Farish & Co. v. Reigle*, 11 Grat. 697.

See APPEALS.

## INSURANCE.

A building insured, in which, one person has a life estate and another has the reversion, sustains a partial injury from fire, for which indemnity is due from the insurers. Either the tenant for life or the reversioner is entitled to have the amount due from the insurance office applied to the repair of the building. *Brough v. Higgins et als.*, 2 Grat, 408.

## INTEREST.

1. The whole profits of infants' estate being necessary for their support the interest on the annual balances of the administration account, the hires of slaves and other annual profits in the hands of the administrator, should not be involved in the administration account, but should go into the account between the guardian and administrator. *Jackson's adm'r v. Jackson's heirs*, 1 Grat. 143.

2. An executor who is residuary legatee, is bound to pay interest on legacies, though not demanded for fourteen years. *Bourne's ex'or v. Meehan*, 1 Grat. 292.

3. Vendee put into possession of land, bound to pay interest on the purchase money. *Oliver's ex'or v. Hallam's adm'r*, 1 Grat 298.

4. Tenants holding property which is the subject of controversy in a pending suit, are bound to pay interest upon the rents, though it is not ascertained who is the party entitled to receive them. *Commonwealth v. Ricks*, 1 Grat. 416.

5. An executor paying away assets to a distributee without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid, with interest thereon from time of payment. *Cookus v. Peyton's ex'or*, 1 Grat. 431.

6. Distributees receiving assets of the estate from the executor may be compelled to refund for payment of debts the amount of assets so received, with interest. *Ibid.*

7. The account filed with a declaration is dated 30th Sept. 1835. The jury give interest from the first of January preceding. This is no error. *Dabney's v. Knapp, Preston & Co.*, 2 Grat. 354.

8. A trustee who is bound to account for rents must pay interest on them. *Mundy v. Vawter et als.*, 3 Grat. 518.

9. Interest not allowed upon ground rents which proprietor has unreasonably delayed to sue for. *Mulliday v. Machirs ex'or*, 4 Grat. 1.

10. The balance of principal and interest on a guardian's account is not

to be aggregated and interest charged thereon. *Cunningham v. Cunningham*, 4 Grat. 43.

11. An administratrix or any other fiduciary whose duty it is to hire out slaves for the benefit of *cestuis que trust* will be held to account for interest on their estimated hires. *Cross' curatrix v. Cross' legatees*, 4 Grat. 257.

12. Interest is not chargeable on estimated hires of slaves, except against fiduciaries whose duty it is to hire them out. *Ibid.*

13. Interest is not to be charged upon the interest due at the close of an administration account. *T. Morris' adm'r v. S. Morris' adm'r et als.*, 4 Grat. 293.

14. An executor sells a slave belonging to his testator's estate, the sale not being necessary for the payment of debts, and he re-purchases the slave and thereafter holds him as his own. The slave is the property of the estate, and the executor shall account for his annual hires with interest thereon, though he was not in fact hired out by the executor. *Woods' ex'or v. Depriest et als.*, 5 Grat. 6.

15. An executor takes bonds for purchases made at a sale by himself of testator's personal estate, and it does not appear when these bonds were paid off. He will be charged with the principal of these bonds in the year when they fell due, but with interest only from the end of the year. *Ibid.*

16. Interest on the arrears of an annuity which was to be paid in agricultural products at a particular place and the value of which was to be ascertained by testimony, will not be allowed without a demand at the place where it was to be paid or an agreement to dispense with such demand and to convert it into money. *Phillips et als. v. Williams, &c.*, 5 Grat. 259.

17. A party to a compromise, entered into, in ignorance of important facts connected therewith, binds himself to pay and does pay more than he was originally bound to pay. He is entitled to recover back the amount so overpaid, with interest from the time of payment. *Ross' ex'or v. McLaughlin's adm'r et als.*, 7 Grat. 86. *Same v. Haden's adm'r. id.*

18. The penalty and condition in a penal bond for the payment of money are in the same sum. It is proper to treat it as a single bill and to give judgment for the amount of the bond with interest from the time of judgment. *Fleming v. Toler*, 7 Grat. 310.

19. A legacy bears date from the end of the year, though for thirteen years there has been no hand to receive it. *Lyons' adm'r v. Magagna's adm'r*, 7 Grat. 377.

20. Under the act March 2d. 1827, a landlord is entitled to interest on rent in arrear, from the time it was due. *Brooks v. Wilcox*, 11 Grat. 411.



21. Upon a bond to pay the purchase money of land, with a provision that upon the purchaser's failure to get the legal title from a third party, the contract of sale shall be void, the purchaser having been let into possession and continuing to hold, and himself neglecting to get in the title, he shall pay interest. *Bailey v. James*, 11 Grat. 468.

See WITNESS.

---

### INTERROGATORIES.

1. A party to a cause is not bound to answer interrogatories which may subject him to a penalty or forfeiture. *Poindexter et als. v. Davis et als.*, 6 Grat. 481.

2. This rule is not confined to cases, where the purpose of the suit is to enforce the penalty or forfeiture, but extends to those where the discovery itself would expose the party to some action, or any criminal or penal prosecution, tending to the like result. *Ibid.*

3. If the Court permits improper interrogatories to be filed, and directs them to be answered, the party to whom they are directed, may answer them and then on the trial of the cause, may object to their admission as evidence. *Ibid.*

4. By the act, April 16th 1852, Sess. Acts, 1851-'2, ch. 92, § 4, p. 77, which authorizes the plaintiff in an action to file interrogatories to a defendant in custody, and authorizes the Court upon notice to the plaintiff or his attorney to discharge a defendant from custody, applies to the defendant in custody of his bail, as well as a defendant in jail. *Levy v. Arnsthall*, 10 Grat. 641.

---

### ISSUES OUT OF CHANCERY.

1. The Court in which a suit is pending to contest the validity of a will, admitted to probat, may direct the issue *devisavit vel non* to be tried at its own bar, on the Chancery side of the Court. *Coalter's ex'or &c., v. Bryan and wife, &c.*, 1 Grat. 18.

2. The issue *devisavit vel non* may be made up in the words of the statute and feigned pleadings are unnecessary. *Ibid.*

3. Upon the issue *devisavit vel non*, the party sustaining the will is plaintiff and entitled to open and conclude the case before the jury. *Ibid.*

4. Where a party has interest both under and against the will, he may be

permitted by the Court to elect whether he will be plaintiff or defendant, in the issue. *Ibid.*

5. Upon directing the issue *devisavit vel non*, the Court should, if moved so to do, direct the executor, if a competent witness, to be received and examined on the trial. *Ibid.*

6. On a bill to enjoin a judgment, on the ground that the debt on which it is founded, was for money won at cards, it being doubtful on the evidence whether such was the consideration, or, if it was, whether the plaintiff in the judgment had not been induced by the concealment, or misrepresentation of the debtor to take an assignment of the debt, under the belief that the consideration of the debt was lawful, the Court should continue the injunction and direct an issue to ascertain the facts. *Nelson's adm'r v. Armstrong et als.*, 5 Grat. 354.

7. Under circumstances of great suspicion an issue directed for the purpose of ascertaining whether the claim of a creditor, for which he seeks to subject slaves loaned to his debtor, was fair and *bona fide* or fictitious and fraudulent. *Beale v. Digges et als.*, 6 Grat. 582.

8. Where the subject matter of controversy is in the nature of unliquidated damages, and the accuracy and credit of the witness is impeached, an issue should be directed. *Isler & wife v. Grove & wife*, 8 Grat. 257.

9. In a suit in equity, if there is no conflict in the evidence, no ambiguity or uncertainty in it, but simply a failure to prove material facts, it is improper to direct an issue. *Reed v. Cline's heirs*, 9 Grat. 136.

10. There may be an appeal from a decree directing an issue, where the decree impliedly involves a settlement of the principles of the cause. *Ibid.*

11. In a case of usury, if an issue is directed in the absence of proof, and there is a verdict finding the usury, still the injunction should be dissolved and the bill dismissed. *Wise v. Lamb*, 9 Grat. 294.

12. Upon an issue out of Chancery, properly directed the verdict of the jury is conclusive, when there is no exception spreading the facts upon the record. *Lee's ex'or v. Boak*, 11 Grat. 182. *Fitzhugh's ex'or v. Fitzhugh*. *id.* 210.

13. In a Chancery cause, if upon the state of the proofs at the time an issue is directed, the will should be dismissed, it is error to direct an issue; and although the issue is found for the plaintiff, the bill should notwithstanding be dismissed at the hearing. *Smith's adm'r v. Betty et als.*, 11 Grat. 752. *Same v. Thurman et als.* *id.*

14. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses or one witness, with

corroborating circumstances, in support of the bill, it is error to direct an issue. The onus must be shifted and the case rendered doubtful by the conflicting evidence of the opposing parties before an issue should be ordered. *Ibid.*

---

## JEOfAILS.

1. An indictment for murder states that the mortal wound was inflicted on the 7th Nov. 1845, that the deceased languished until the 8th Nov., in the year aforesaid and then alleges "on which said 8th of May, in the year aforesaid, the deceased died. The prisoner pleads not guilty. *Held*: the insertion of May for November is a mistake apparent upon the face of the indictment, and will not exclude proof of the death subsequent to the 7th of November, or be cause for arresting the judgment. *Alstroek's case*, 3 Grat. 650.

2. In a writ of right, the failure to file a plea is error not cured by a verdict in favor of the tenant. *Rowans v. Givens*, 10 Grat. 250.

3. An action on the case against the personal representative of a vendor, for fraud in the sale of an unsound slave, which the plaintiff was induced to purchase by means of a false and fraudulent warranty or the fraudulent concealment of unsoundness, can not be maintained, and though there is a judgment for the plaintiff, the error is not cured by the statute of Jeofails, 1 Rev. Code, p. 511, ch. 28, § 103. *Boyle's adm'r v. Overby*, 11 Grat. 202.

4. In such a case though there is a verdict for the plaintiff, there should be a judgment for the defendant. *Ibid.*

5. An action is misconceived in the sense of the statute, only when, upon the trial, the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is then held liable upon proofs showing a liability; and if no objection is made to the form of action until after the verdict, the defect is cured. *Ibid.*

6. To hold a defendant liable upon a cause of action not asserted, is going to the utmost verge of the law, even where such cause of action is proved. But to hold him liable for such cause when not proved or proved by evidence not admissible, if the action had been brought for that cause, is going beyond the letter and spirit of the law. *Ibid.*

7. The statute, though it will aid defects, whether of form or substance in pleading, where a portion of the matter is appropriate, does not apply to causes, to which the matter pleaded is in all its parts merely nugatory, setting forth no ground of action, or no ground of defence, *Ibid.*

## JOINT-TENANTS.

L. being in possession of land, to which he has no title, but which he is authorized to rent out for his own benefit, makes a written contract with A., to let to him the land for a year, upon the terms that L. shall find the tools to work the land and the seed to sow it, and A., shall board himself and family, work the crop and when it is gathered, give one half of it to L. This is not a lease rendering rent in kind, as the reservation of one half of the crop was not incident to the reversion, and consequently gave no right of distress; but the contract constitutes the parties joint-tenants of the crop raised. *Lowe v. Miller*, 3 Grat. 205.

---

## JUDGMENTS.

1. A judgment against the ancestor only binds the heir, when it can not be paid out of the personal estate of the ancestor. *Rogers v. Denham's heirs*, 2 Grat. 200.

2. Where a *fi. fa.* has been issued upon a judgment within the year and day is and has been enjoined, the judgment to a lien upon a moiety of all the lands owned by the debtor at the date of the judgment, or which were afterwards acquired, in the hands of *bona fide* purchasers for value without notice.\* *Taylor's adm'r v. Spindle*, 2 Grat. 44.

3. So long as a judgment may be revived, it is a lien on all the lands owned by the debtor at the date of the judgment, or which he afterwards acquired, into whosoever hands they may have come. *Ibid.*

4. A Court of Equity will entertain the bill of a judgment creditor, when the debtor has subsequently to the time of the judgment, conveyed his land in trust for the payment of debts, or other trusts, authorizing the sale of the land. And in such case, the Court will decree a sale of the land to satisfy the judgment. *Ibid.*

5. It is not necessary that a judgment creditor should have issued an *elegit* on his judgment before coming into equity for relief. *Ibid.*

6. A deed executed before judgment has been obtained against the grantor, under which the purchaser has been put into possession and paid the purchase money, but which was not recorded until after the judgment was obtained is void as against the judgment creditor. *M'Clure v. Thistle's ex'ors.* 2 Grat. 182.

7. The deed is void as to a judgment creditor who has levied a *ca. sa.* upon his debtor, who thereupon was discharged as an insolvent debtor. *Ibid.*

\* See Code, p. 708-'9, Ch. 186, §§ 3, 4, 8.

8. Upon a *scire facias* against bail, it is error to give judgment for the aggregate amount of principal, interest and costs, with interest thereon. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

9. Notwithstanding upon the trial of a *scire facias* the jury has found for the plaintiffs a sum different from that stated in the *scire facias*, it is merely supererogatory and the Court should give judgment for the proper sum. *Ibid.*

10. A judgment enjoined is still in force, as a security for the amount to which the plaintiff may be entitled. *Kuifong v. Hendricks et als.*, 2 Grat. 212.

11. The lien of a judgment is a legal lien, and a purchaser of the legal title from the debtor takes it subject to the lien, though he had no notice of it.\* *Leake v. Ferguson*, 2 Grat. 419.

12. On a joint judgment against several, the service of a *ca. sa.* upon one and his execution and forfeiture of a forthcoming bond, does not extinguish the lien of the judgment upon the lands of the others. *Ibid.*

13. Prior to the act of 1852, Sup. Rev. Code, ch. 282, § 1, a judgment in favor of the Commonwealth against its general debtors only bound one moiety of the debtor's lands. *Ibid.*

14. The judgment lien does not give title to rents and profits before a decree. *Ibid.*

15. A foreign judgment does not merge the specialty on which it is founded, as against the heirs in Virginia. *Beall's adm'r v. Taylor's adm'r and heirs*, 2 Grat. 532.

16. A jury having convicted the prisoner, and fixed the term of his imprisonment in the penitentiary for a shorter period than the law allows, it is error in the Court to enter a judgment on the verdict for the shortest period of imprisonment authorized by the law for the offence. *Nemo's case*, 2 Grat. 558.

17. Debt on *scire facias* may be brought upon a judgment, "when assets" or "if assets," or if upon the plea of *plene administravit*, the verdict is for the administrator, the plaintiff may take another judgment "when assets." *Braxton v. Wood's adm'r*, 4 Grat. 25.

18. No execution can issue upon a judgment, "if assets," but plaintiff may proceed immediately by action of debt or *scire facias*, to ascertain whether there is not a surplus of assets after paying the debts which have priority to his judgment. *Ibid.*

19. Judgment, "when assets" or "if assets" is within the operation of the statute of limitations. *Ibid.*

20. Suit brought upon a judgment and dismissed does not prevent the bar of the statute. *Ibid.*

21. A judgment is a lien upon the lands of the debtor at the date of the judgment in the hands of *bona fide* alienees for value. *Rogers v. M'Clure's adm'rs et als.*, 4 Grat. 81.

22. The land last sold is first to be applied to satisfy the judgment, though the last purchaser obtained a conveyance first; the first having had a good equitable title. *Ibid.*

23. A judgment debtor having enjoined the judgment, and the injunction having been dissolved, and the surety in the injunction bond having paid off the judgment, he is entitled to be substituted to the judgment lien. *Ibid.*

24. The fiction of law which makes a judgment relate back to the first day of the term, applies to all cases when the judgment or decree might have been rendered on that day, but not to a case where it could not have been rendered. *Withers v. Carter et als.*, 4 Grat. 407.

25. A creditor by judgment or decree may, in equity, subject the debtor's equitable interest in land sold by him, for the purchase money unpaid; and such creditor will be preferred to a subsequent assignee of the purchase money. *Ibid.*

26. A purchaser of land, subject to the lien of a judgment, is entitled to have the purchase money applied to the discharge of the judgment. *Ibid.*

27. A court of equity will set aside a fraudulent sale of personal property by a judgment debtor at the suit of a judgment creditor and direct the purchaser to deliver it to a commissioner to sell it. If the purchaser fails to deliver it to the commissioner, the Court will direct an account of its value and subject the purchaser for the value so ascertained. *M'New v. Smith*, 5 Grat. 84.

28. Upon setting aside a conveyance of real estate as fraudulent, at the suit of a judgment creditor, the Court can decree the sale of only one moiety of the lands to satisfy the judgment. *Ibid.*

29. If a debtor conveys lands fraudulently, and retains other lands, on setting aside the conveyance at the suit of a judgment creditor, there will be a decree for a sale of only the moiety of the whole, embracing in said moiety the land retained by the debtor. *Ibid.*

30. A judgment will be enjoined for a mistake of the jury, ascertained by after discovered evidence. *Rust et als. v. Ware*, 6 Grat. 50.

31. A bankrupt having obtained his discharge subsequent to a judgment against him, may enjoin the suing out or levy of any execution, upon the judgment. *Peatross v. M'Laughlin*, 6 Grat. 64.

32. The written agreement between the maker and payee of a note in relation to the contract in execution of which the note was made, having been lost at the time the judgment was recovered on the note by the holder thereof, and without which agreement the maker of the note could not make his defence at law, of fraud in the procurement of the note, that is a ground for the jurisdiction of a Court of Equity to enjoin the judgment. *Vather v. Zane*, 7 Grat. 246.

33. A judgment on a forthcoming bond enjoined at the suit of a surety therein, on the ground that he has an action pending against the creditor for a large amount and that the creditor is insolvent. *M' Clelland v. Kin-naird*, 6 Grat 352.

34. The act 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a *scire facias* to revive a judgment is not repealed by the act of March 29th 1831, Sup. R. C. ch. 197, § 2, on the same subject. *Williamson v. Crawford*, 7 Grat. 202.

35. Upon a *scire facias* to revive a judgment, neither a declaration nor a rule to plead is necessary. And if the writ is made returnable to the rules and the defendant makes default, there should be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. *Ibid.*

36. *Quære*: what would be the effect generally of a judgment against an administrator *de bonis non*, in establishing a debt against the estate so as to conclude a former executor or administrator and thereby subject him to a *devastavit*. *Sheldon's adm'r et als. v. Armistead's adm'r et als.*, 7 Grat. 264.

37. An executor signs a note for the debt of his testator, as executor. there is an action thereon against him as executor but the count is in the *debet and detinet* and the breach is for the failure to pay. *Quære*: Whether upon a judgment by default it should be against him as executor or personally. *Snead v. Coleman and wife*, 7 Grat. 300.

38. If it is error to give a personal judgment against him, it is error to be corrected by motion to the Court and not appeal. *Ibid.*

39. *Quære*: If a judgment against a personal representative, *quando acciderint* is within the statute of limitations in relation to judgments. *Smith's adm'r v. Charlton's adm'r*, 7 Grat. 425.

40. A judgment confessed in a suit pending, in court, and the oath of insolvency taken thereon by the debtor, upon his surrender by his bail has relation to the first moment of the first day of the term; and therefore the assignment by operation of law has preference to the lien of a forthcoming bond returned to the clerk's office of the first day of the term. *Jones, &c., v. Myrick's ex'ors*, 8 Grat. 179.

41. Though a forthcoming bond is forfeited and not quashed, the lien of the original judgment continues. *Ibid.*

42. Lands subject to a judgment lien which have been sold or encumbered by the debtor, are to be subjected to the satisfaction of the judgment, in the inverse order in the point of time, of the alienation and incumbrances, the land last sold or encumbered being first to be subjected. *Ibid.*

43. A judgment creditor, having by his conduct, waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable. *Ibid.*

44. A judgment creditor concluded by a decree in a cause in which he is a defendant, though he has, at the same time, a suit depending against the same parties, to enforce his prior lien. *Ibid.*

45. A judgment against an administratrix, upon the bond of her intestate is conclusive of the validity of the debt against the administratrix. *Montague's adm'x v. Turpin's adm'x et als.*, 8 Grat. 453.

46. An injunction to a judgment at law, dissolved as improvidently awarded, without answer, though the bill charges that the judgment was recovered without appearance or defence, for money which the plaintiff in the judgment alleged he had paid as surety, though he had not, in fact paid one cent of the money, but the same had been paid by another surety against whom there was a joint-judgment with the plaintiff at law; and that of this the plaintiff in the bill had no knowledge until after the judgment and could not therefore make his defence at law. *Slack v. Wood*, 9 Grat. 40.

47. A judgment is recovered by the assignee of a bond given for the purchase money of land, the contract for which is rescinded after the assignment. The debtor is not entitled to enjoin the judgment, as to the assignee. *Drake v. Lyons*, 9 Grat. 54.

48. A judgment is a lien upon lands in the hands of a purchaser, though at the time of the conveyance, execution upon the judgment was suspended by an injunction; and the lien exists, though the judgment was not docketed, the purchaser having had notice thereof. *Craig v. Sebrell*, 9 Grat. 131.

49. Upon a *scire facias* against bail, he surrenders his principal and gives notice thereof to the attorney of the plaintiff, the plaintiff not being in the county, but there is an office judgment against the bail, and he not defending it, it is confirmed. Equity will not relieve. *Allen, Walton & Co. v. Hamilton*, 9 Grat. 255.

50. The judgment of a Circuit Court against a high sheriff is conclusive



of its jurisdiction unless reversed on appeal, and his deputy and sureties cannot question it, on the motion of the administratrix of the high sheriff against them. *Cox et als. v. Thomas' adm'r*, 9 Grat. 323.

51. Though lands are conveyed in trust to secure debts, a judgment having priority to the deed is a lien upon only a moiety of the land. *Buchanan v. Clarke et als.*, 10 Grat. 164.

52. If some of the land embraced in a judgment lien is also embraced in a deed of trust, subsequent to the judgment and other of it is not, the latter should be sold, with only so much of that embraced in the deed, as will make a moiety of the whole. *Ibid.*

53. If there are two judgments having preference to the deed, the remaining moiety should be sold and applied to pay the second judgment. *Ibid.*

54. An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or offsets which he might have pleaded at law; and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law; or he should have filed interrogatories under the statute. *George v. Strange's ex'ors*, 10 Grat. 499.

55. The lien of a judgment is not defeated by a discharge of the debtor as a bankrupt; and it may be enforced in the state courts. *McCance v. Taylor*, 10 Grat. 580.

56. An *elegit* issued upon a judgment rendered against a bankrupt before his bankruptcy, may be in the usual form, and in executing it, the sheriff must take notice of the bankruptcy of the debtor. *Ibid.*

57. It was not improper even before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant against a person for whose benefit a suit was brought, when the defendant succeeded in the case. *Pates v. St. Clair*, 11 Grat. 22.

58. In a suit brought in the name of one person for the benefit of another a judgment stating that the parties appeared by their attorneys and by consent the suit was dismissed and judgment for defendants costs against the person for whose benefit the suit was brought, it must be held that the consent is the consent of the latter and that the judgment is proper. *Ibid.*

59. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant. The injunction in such case operates upon the judgment as revived. *Richardson's adm'rs v. Prince George justices*, 11 Grat. 190.

60. A surety in a forthcoming bond is a surety for the debt and when he pays it is entitled to all the rights of the creditor against the original

debtor subsisting at the time he became bound for the debt. And the judgment for the benefit of the surety so paying is not extinguished but transferred with all its obligatory force against the principal; and is a lien upon his lands owned at the date of or subsequent to the judgment. *Hill v. Manser et als*, 11 Grat. 522.

See INJUNCTIONS.

---

### JUDICIAL SALE.

1. A purchaser of land at a judicial sale can only obtain relief for defects in the title or incumbrances on the title by resisting the confirmation of the sale upon the return of the commissioners' report. *Thralkelds v. Campbell*, 2 Grat. 198.

2. As a general rule a sale of land under a decree enforcing the vendor's lien, should be upon a reasonable credit. *Kyle's v. Tait's adm'r*, 6 Grat. 44.

3. Though a decree directing a sale does not direct the commissioners to convey to the purchasers, yet if they do convey and they do report the fact and the Court confirms the report, the decree of confirmation gives full effect to the deed and relates back to the time of its date. *Evans and wife v. Spurgin*, 6 Grat. 107.

4. A sale and conveyance of land under a decree in a suit, by a creditor against the executor, to which the devisees are not parties, does not pass the legal title. *Hudgin v. Hudgin's ex'or*, 6 Grat. 320.

5. Though such purchaser can not hold the land against the devisees, he is entitled to be substituted to the rights of the creditor against it. *Ibid*.

6. A decree for the sale of infants' land directs it to be sold upon the premises. It is irregular to make the sale elsewhere. The commissioner should have reported that the sale could not be made there for the want of bidders, and obtain instructions for his future conduct. *Talley et als. v. Starke's adm'x et als.*, 6 Grat. 339.

7. A sale having been irregularly made, as the purchaser could not enforce his contract, if resisted by the parties in the cause, he should not be compelled to execute it. *Ibid*.

8. Though some of the purchasers are content to affirm the sale, yet as it is set aside, as to others, the Court will set it aside as to all if the interests of the infants require it. *Ibid*.

9. The title to land having been obtained by a suit in equity by the assignee of the purchase money, in which a conveyance was decreed; after the decree, but before the conveyance is made, a son of the vendor files a

bill in another court, in which he falsely and fraudulently alleges, that he had paid off the incumbrance on the land and retained the lien; and with the fraudulent connivance of the vendor, who is insolvent, he obtains a decree for the sale of the land to satisfy his pretended lien; and the land is sold, and the sale is confirmed. *Held*: The conveyance to the vendee having been made in pursuance of a contract entered into long before the commencement of the suit by the son of the vendor, and in obedience to a decree made before the commencement of that suit, the deed had relation back to the date of the contract, or at least to the date of the decree directing it; and therefore the decree and sale in the son's suit is inoperative against the title of the vendee, and gives him no equity for an injunction and rescision of the contract. *Young's adm'r and Bowyer v. McClung et als.*, 9 Grat. 336.

10. The decree in the son's suit may, and must, if necessary for the protection of the vendor and his assignee, be held to be wholly inoperative as to them. *Ibid.*

11. The purchaser under the decree in the son's suit, having been cognizant of the proceedings in the suits of the vendee to enjoin the purchase money, and of the assignee to procure the title, and being in fact bound as surety for that purchase money, and having purchased and permitted the sale to be confirmed without objection, is not entitled to be relieved from his purchase, and from paying his purchase money, though he acquires no valid title to the land purchased by him. *Ibid.*

12. In a controversy between a judgment creditor and creditors claiming under a deed of trust, the Court having decreed a sale of all the land, and it having been purchased by a party claiming under the deed of trust, and the final decree being in his favor, and a conveyance to him being directed, upon appeal by the party claiming under the judgment, the decree is reversed. The claim of the purchaser must fall with the reversal of the decree; the purchaser not being a stranger to the controversy purchasing at a judicial sale, but the party chiefly benefitted by the proceedings complained of. *Buchanan v. Clarke et als.*, 10 Grat. 164.

13. A purchaser at a sale of land made by a commissioner of delinquent lands is not bound to prove that all the proceedings of the commissioner and the Court were regular. The proceeding is in the nature of a judicial proceeding, and the orders and decree of the Court made in it are conclusive, at least upon all strangers. *Smith et als. v. Chapman*, 10 Grat. 445

See VENDOR AND PURCHASER.

---

## JURISDICTION.

See APPEALS; CRIMINAL JURISDICTION AND PROCEEDINGS; EQUITABLE JURISDICTION AND RELIEF; AND PLEADING.

1. Hasty expressions of a juror, who swears he has formed no opinion of the guilt of the prisoner, and feels no prejudice against him do not render him incompetent. *Hailstock's case*, 2 Grat. 564.

2. On a trial for felony the Court has no right to discharge a jury, without the consent of the prisoner, merely because the Court is of opinion that the jury will not be able to agree. *William's case*, 2 Grat. 567.

3. There must be a necessity for the discharge of the jury, to authorize it. *Ibid.*

4. The practice of finally adjourning the Court without noticing the jury, whereby it is discharged by operation of law or of discharging it simultaneously with the final adjournment of the Court approved. *Ibid.*

5. If the Court improperly discharge the jury without the consent of the prisoner he is entitled to be discharged from the prosecution. *Ibid.*

6. Under the act of February 24th 1846, a juror in a criminal case must be a freeholder in the county to the officer of which, the *venire facias* is directed.\* *Day's case*, 6 Grat. 629.

7. A person having the equitable interest in land, and entitled to call for the legal title, is a freeholder, qualified to serve as a grand juror. *Helmondollar's case*, 4 Grat. 536.

8. What opinions formed and expressed will not disqualify a juror, in a trial for murder. *Epes' case*, 5 Grat. 676.

9. Several days being taken up in completing the panel, in a trial for murder, it is not necessary that the jurors who have been sworn, shall be committed to the custody of the sheriff, until the whole number of the panel is completed. *Ibid.*

10. The prisoner objecting to a juror on the ground that the *venire facias* was illegally executed, and the Court sustaining the objection, it is proper to set aside the whole panel and direct another *venire facias*. *Ibid.*

11. Under the circumstances, the testimony of jurors received to prove that they rendered a verdict under a mistake as to its legal effect. *Moffett v. Bowman*, 6 Grat. 219.

12. A verdict which is in all respects fair, and in the judgment of the Court which tried the cause, in conformity to the evidence, will not be set aside on the testimony of a few of the jurors that they had been induced to agree to the verdict under a misapprehension of an instruction of the Court. *Hansbarger's adm'r v. Kinney*, 6 Grat. 287.

13. What opinions formed and expressed beforehand do not disqualify as a juror in a criminal case. *Smith's case*, 6. Grat. 696.

14. The property which an heir has in a tract of land on which there is a mill, which land has been allotted to and is in possession of the widow as dower does not disqualify as a grand juror. *Wysor v. Commonwealth*, 6 Grat. 711.

15. The entertaining a decided opinion of the prisoner's guilt formed on the testimony as published in the newspapers is not a valid objection to a juror, if he thinks he can discard the opinion and that it would not influence his judgment; and that he could give the prisoner a fair trial according to the law and evidence as submitted to the jury. *Smith's case*, 7 Grat. 593.

16. The prisoner was charged in different indictments with having advised, &c., two slaves to abscond, the advice being given to both at the same time, a *venireman* summoned on the first trial was stricken from the panel by the prisoner. This is not a valid objection to him as a juror on the second trial. *Ibid.*

17. A person having expressed himself, before the jury were impannelled, as determined to punish the prisoner, if taken upon the jury, not from any malice towards him, but from an opinion of his conduct, is no ground of setting aside the verdict and granting a new trial. *Curran's case*, 7 Grat. 619.

18. The Code, ch. 208, § 10, p. 774, gives to all jurors sitting in criminal cases compensation at the rate of one dollar a day for each day of service. *Smither's case*, 7 Grat. 673.

19. On a trial for murder, it is ground for challenge of a juror, on the part of the Commonwealth, that he says he has conscientious scruples about the propriety of capital punishment and is opposed to it; and if the proofs show the prisoner guilty of murder in the first degree, he does not know that he will convict him. *Clore's case*, 8 Grat. 606.

20. An opinion formed by a juror from rumor alone but existing on the mind at the time and to which opinion he will stick unless the evidence turns out different from what rumor had reported it to be, is not good cause of challenge by the prisoner, where the juror has no prejudice or partiality for or against the prisoner, and he believes he can give him a fair and impartial trial according to the evidence. *Ibid.*

21. An objection to a jurymen that he is not qualified, according to law, comes too late after he is sworn to try the issue. *Thompson's case*, 8 Grat. 637.

22. It is not misbehavior in a juror, between the adjournment of the Court in the evening and its meeting the next morning to drink spirituous liquors in moderation. *Ibid.*

23. And it is not misbehaviour for a jury to drink at the invitation of

one of the Commonwealth's witnesses, if it is done in the presence of the sheriff and is obviously intended as a mere act of courtesy. *Ibid.*

24. In walking out for exercise, the jury, with the sheriff pass beyond the limits of the county, in which the prosecution is pending. This is no ground for a new trial. *Ibid.*

25. A sheriff to whom a jury is committed during the progress of a criminal trial, walks out with them to a neighboring house and whilst there withdraws from the room where they are, leaving them in the company of three other persons. Although these other persons swear that there was no allusion made by them to the trial, during such absence of the sheriff, yet the verdict of the jury is to be set aside and a new trial awarded. *Wormley's case*, 8 Grat. 712.

26. It is a good objection to a juror in a case of felony, that he is not a freeholder.\* *Dowdy's case*, 9 Grat. 727.

27. If the prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being struck from the panel by the prisoner or his not being drawn as one of the twelve, who are to try the prisoner. *Ibid.*

28. A juror summoned for the trial of a prisoner fails to appear, on the day to which he is summoned, but appears at another day, under a rule to show cause why he should not be fined for failing to appear. If in other respects qualified, he may be put upon the panel, that not having been completed when he appears. *Wormley's case*, 10 Grat. 658.

29. What is not such an opinion as will disqualify a juror for serving on a trial for felony. *Ibid.*

30. After the original *venire* is exhausted without finishing the panel, the Court may order any number of persons to be summoned, it may think necessary; and if the sheriff, for the want of time or other causes, fails to summon the whole number, the return is valid for as many as are summoned. *Ibid.*

31. On a trial for arson, the nephew of the deceased wife of the person whose house has been burned, is an incompetent juror. *Jaques' case*, 10 Grat. 690.

32. In such a case if the wife left no issue, it is for the prosecution to show it; and that fact not being shown, the objection is valid. *Ibid.*

33. As no challenge to a juror is allowed to the Commonwealth except for cause, when such challenge is made, the cause should be shown and should be a good and legal cause for the exclusion of the juror; otherwise it should be overruled. *Montague's case*, 10 Grat. 767.

\* See note, ante, p. 220.

34. The Court cannot, of its own motion, set aside a juror without good cause, except where he is physically or mentally disabled from properly discharging the duties of a juror, or is disqualified by a statute. *Ibid.*

35. If the Court sets aside a competent juror, it is error for which the prisoner may except and have the judgment reversed. *Ibid.*

36. What does not render a juror incompetent. *Ibid.*

See CRIMINAL JURISDICTION AND PROCEEDINGS AND NEW TRIAL.

## JUSTICES.

1. A justice of the peace has jurisdiction to hear a motion and to give judgment against a constable and his surety, for the failure by the constable to pay over money collected on execution. *Hendricks v. Shoemaker*, 3 Grat. 197.

2. The jurisdiction of the justice in such cases is not confined to twenty dollars. *Ibid.*

3. One joint-notice to a constable and his sureties, upon default of the constable in several cases, is sufficient; and the justice should give a separate judgment in such case. *Ibid.*

4. The Governor may commission some of the persons recommended as justices at the same time by the County Court, and may decline to commission others.\* *Frederick justices v. Bruce et als.*, 4 Grat. 281.

5. A person who has been commissioned by the Governor, as a justice, may take the oaths of office before a justice of the peace, if it is done in the Court house on a Court day. *Ibid.*

6. Upon an application to establish a public landing, the viewers report that a list of 120 persons was shown to them who would be benefitted by establishing the landing. Two of these persons were justices of the peace of the county and when the order awarding the writ of *ad quod damnum* was made, they were on the bench; and one of them was on the bench when the landing was established. This is no legal objection. *Muire v. Falconer et als.*, 10 Grat. 12.

7. A justice of the peace acting as coroner and having as coroner committed a person to jail for felony, may certify the fact of such committal as a justice of the peace. *Wormley's case*, 10 Grat. 658. †

See BAIL.

\* Elected by the people, Ar. 6, § 27, Con. 185.

## LACHES.

1. Land is sold for non-payment of taxes and bought by the sheriff; the owner thereof being then insane, and continuing so until his death, seven years after the sale. Eighteen years after the sale the devisee of the original owner files a bill against the purchasers from the sheriff to recover the land. She is not barred by the delay in prosecuting the claim. *Taylor's devisee v. Stringer et als.*, 1 Grat. 158.

2. Bill is filed by one partner against the administratrix of the other, nine years after the dissolution of the partnership. Not such *laches* as to forbid an account. *Marsteller v. Weaver*, 1 Grat. 158.

3. A vendor of real estate, retaining the title, the statute of limitations can not be set up as a bar to his recovery of the purchase money, nor is the staleness of the demand any defence. *Hopkins' adm'r v. Cockerel et als.*, 2 Grat. 88.

4. The lapse of time during which a ward is prosecuting her claim against the administratrix of her guardian is no ground for the exoneration of the surety of the guardian. *Roberts v. Colvin*, 3 Grat. 358.

5. In a suit by the proprietor to recover ground rents, the defendant, in his answer admits that the rents have not been paid. Lapse of time is no bar to the recovery. *Mulliday v. Machir's adm'r*, 4 Grat. 1.

6. Delay in the prosecution of a pending suit, where there is not evidence of abandonment, will not deprive the party of his right to revive and prosecute it. *Chinn et als. v. Murray et als.*, 4 Grat. 348.

7. An administrator qualifies as such in 1785; his administration terminates in 1794, and some years afterwards he dies, never having settled his administration account. The distributee who was a child in 1785, files his bill in 1819 against the representative of the administrator for an account, who professes total ignorance as to the accounts, except what may be learned from the books and papers of the administrator, but submits in the answer to account. After an account has been taken and a decree has been made upon it, the objection on the ground of *laches* will not avail in the appellate Court. *Will's adm'r v. Dunn's adm'r*, 5 Grat. 384.

8. A residuary legatee barred by lapse of time, though another suit was pending, by another legatee, to recover her legacy, and it was not ascertained until the decree in that case, that there was a *residuum*. *Anderson, adm'r, &c., v. Burwell's ex'ors*, 6 Grat. 405.

9. A party who comes into equity to enforce any equitable claim, must do so, within a reasonable time, and must not delay until, by his negligence, there can no longer be a safe determination of the controversy, and his adversary is exposed to injustice from loss of information and evidence and means of recourse against others, occasioned by deaths, insolvencies and other untoward circumstances. *Smith et als. v. Thompson's adm'rs et als.* 7 Grat. 112,



10. The application of this equitable doctrine is for the sound discretion of the court and does not require the conviction of the court against the original justice of the claim, or of any other specific ground of defence: but its belief that under the circumstances of the case, it is too late to ascertain the merits of the controversy. *Ibid.*

11. A creditor not named in a deed of trust may show by proof that he was intended to be secured under the provision for another creditor; and under such circumstances the creditor was not barred by the delay which had occurred from asserting and obtaining relief. *Griffin's ex'or v. A. Macauley's adm'r*, 7 Grat. 476. *Dismal Swamp Land Co. v. Same. id.*

12. A step-father conveyed to his step-son, when a minor living with him, a slave, purporting to be for value and he retained possession of the slave and her increase for many years and until after the death of the step-son. After the death of the step-son, who left no children, his widow filed a bill against the step-father and his wife for distribution of the slaves. This suit was a little less than twenty years from the time when the step-son ceased to live with the step-father. The latter having stood in the place of a parent and guardian to the son until the son ceased to live with him, the claim is not barred by lapse of time. *Roberts v. King*, 10 Grat. 184.

13. A suit for an account of administration was brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his administrator had settled up his estate, showing that there were no personal assets, and in the absence of the first administrator's books and papers, against his heir, who at his death was an infant two years old. The staleness of the claim is conclusive against it. *Hillis v. Hamilton adm'r et als.*, 10 Grat. 300.

14. Under the circumstances, the delay in the prosecution of a pending suit for twenty-three years, held to bar further proceedings in it. *Crawford's ex'or v. Patterson*, 11 Grat. 364.

15. Lapse of time is justly of great weight in controversies about transactions long since past. But this weight is thrown in favor of the party who insists that the state of things existing during the lapse of time shall not be disturbed. It cannot be relied on by parties seeking to change that state of things. *Evans et als. v. Spurgin et als.*, 11 Grat. 615

16. A delay of seventeen years by a specific legatee to sue for his legacy held, under the circumstances, not to bar his claim. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

---

## LANDLORD AND TENANT.

1. In a suit in which the tenant is not a party, but the lessor is, a decree

is made directing the sheriff to rent out the demised premises. The premises are rented out and the tenant yields possession. As the decree did not direct the sheriff to evict the tenant, and there was no paramount title under which the lessee might have been evicted, his surrender of the possession was not an eviction, so as to release him from the payment of the rent. *Murray, Caldwell & Co., v. Pennington*, 3 Grat. 91.

2. The landlord's lien for a year's rent on the goods and chattels of his tenant does not extend to protect them from being taken under execution, except in cases where they are upon the demised premises. *Geiger's adm'r v. Harman's ex'x.*, 3 Grat. 130.

3. Salt works are rented for two-thirds of the salt made, and the lessees covenant to make at least sixty thousand bushels of salt in each year. The landlord is not entitled to distrain or sue for forty thousand bushels, but only two-thirds of the quantity actually made. *Prestons v. McCall*, 7 Grat. 121.

4. Upon a writ of unlawful detainer, the defendant sets up title in himself. The plaintiff may prove that the defendant entered on the premises under a parol lease from himself, though the lease was to continue more than a year. *Mann v. Gwinn et als.*, 8 Grat. 58.

5. T leases land to E by deed, which is executed by E, and he thereby acknowledges that he is in possession under the lease, and covenants to return the possession at the end of the term. E holds over, after the term expires, for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A in fee simple, with a covenant of general warranty, and puts A in possession, and disclaims to hold under T, who then institutes a proceeding of unlawful detainer against E and A. **Held:**

1st. That E is responsible to T for the whole of the leased premises, though at the time of the institution of the proceeding, A was in possession of a part of the land. *Emerick, &c., v. Tavenor*, 9 Grat. 220.

2nd. That T's recovery is not to be confined to the land in the actual occupancy of E and A, but he is entitled to recover all the land demised; and he may show by parol evidence what constitutes the demised premises. *Idem*, 220.

3rd. That E and A were properly joined in this proceeding, though they did not hold the land jointly, but each held a part of the land in severalty; and, if only one of them held a part of the land, T is entitled to a judgment against him, though there should be a judgment for the other. *Idem*, 220.

4th. Though if A was in actual possession of no part of the land claimed by the warrant, at the time it was issued, he would be entitled to a verdict in his favor, yet E, the lessee, would be responsible to T, and there should be a judgment against him, though at the time of the issue of the

warrant he was not in the actual possession and occupancy of any part of the land. *Idem*, 220.

5th. A having entered on the land claiming in fee under the conveyance from E, was not entitled to six months' notice to quit from T, though he had not expressly disclaimed to hold under the lease from T to E: and if he held expressly as under-tenant of E, he would not be entitled to notice. When T. had determined the tenancy of E. by six months' notice to quit, or E had disclaimed to hold as tenant, and thereby deprived himself of the right to notice, it was competent to T to proceed at once to oust both E and A. *Idem*, 220

6th. The lease being for a certain quantity of land situate as therein described, and E having executed it under his hand and seal, and thereby recognized the description and boundaries therein specified, and that he then held the same in possession; and the warrant being for the precise tenement described in the lease, neither E, nor A claiming under him, can be entertained to deny that the tenement had its boundaries, or that they were within them. *Idem*, 220

7th. E and A will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others; nor will they be permitted to introduce their title papers for the purpose of showing that they had not possession of the land claimed by T. *Idem*, 220.

8th. T, if entitled to recover, may recover according to the description of the land in the warrant or in the lease; and he must, at his peril, point out to the sheriff the premises of which he is to give possession. And if he takes more than he has recovered in the action, the court will interfere in a summary way and compel him to make restitution. *Ibid*.

9th. E having entered under the lease and held over after the term expired, if T did any act recognizing him still as his tenant, E became thereby tenant from year to year, upon the conditions of the original lease. If T did not recognize the continued tenancy, E was tenant at sufferance and not entitled to notice to quit. *Ibid*.

10th. E being in as tenant, after the term has expired, he continues to hold as such as long as he remains in possession, unless he disdains to hold as such and asserts a right adverse to T; and such disclaimer and assertion of adverse right are brought home to the knowledge of T, by a full notice by E of his disclaimer and assertion of adverse title. *Quære*: if he must not surrender the possession to T. ? *Ibid*.

11th. A, by entering upon a part of the land, as purchaser from E, thereby becomes subject to the same relations, held by E to his lessor T; and neither could set up an adverse title, unless he showed he had restored the possession to T, or had disclaimed and held adversely, with full notice to T, for the period of limitation presented by the statute. *Ibid*.

12th. E and A could no more deny that the possession under which E entered, than they could controvert his title. *Ibid.*

5. *Quære*: If a tenant can disclaim holding under his landlord and set up an adverse title, without surrendering the possession of the premises? If he can, he cannot deny the title under which he entered or throw the burden of proof on the other side by denying his tenancy. *Creigh's heirs v. Henson*. 10 Grat. 231.

6. A tenant who surrenders possession at the end of his term, or from whom possession has been recovered, is not concluded by the existence of such tenancy, at one time, or by the deed of lease, which he executed, from contesting the title of his former landlord. *Wild's lessee v. Serpell*, 10 Grat. 405.

7. An agreement under seal by a tenant, that he will surrender possession, whenever a purchaser from the landlord requires it, constitutes him a tenant at will or sufferance; and he is not entitled to six months' notice to quit. *Harrison v. Middleton*, 11 Grat. 527.

8. If a tenant claims to hold adversely to his landlord, he is not entitled to notice to quit. *Ibid.*

9. A landlord sells land in possession of his tenant, by agreement under seal, and the tenant refuses to surrender possession. The landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. *Ibid.*

SEE LEASES AND RENTS.

---

## LARCENY.

1. The obligor in a bond may commit larceny in taking it from the hands of the payee. What constitutes a taking with intent to commit a larceny in such a case. *Vaughan's case*, 10 Grat. 758.

---

## LEASES.

1. L being in possession of land, to which he has no title, but which he is authorized to rent out for his own benefit, makes a written contract with A to let him the land for a year, upon the terms that L shall furnish the tools to work the land and the seed to sow it, and A shall board himself and family, work the crop and when it is gathered, give one-half of it to L. This is not a lease, rendering rent in kind, as the reservation of the one-half of the crop was not incident to the reversion and consequently gave no right of distress; but the contract constitutes the parties joint-tenants of the crops raised. *Lowe v. Miller*, 3 Grat. 205.

2. The question whether certain premises are parcel or not of demised premises, if not ascertained by the written contract, is always open to extrinsic evidence; and parol testimony is admissible to show what is embraced in the lease. *Crawford v. Minis*, 5 Grat. 90.

3. The agreement between the landlord and tenant provides that the tenant is "to get the house at the price herein stated for one year after his present year expires, and is to have the preference each succeeding year hereafter." This does not create a tenancy from year to year, and so entitles the tenant to notice to quit. *Ibid*.

See LANDLORD AND TENANT.

---

### LEGACIES AND LEGATEES.

1. A legatee is entitled to interest upon her legacy although she has not demanded it for fourteen years. *Bourne's ex'or v. Mehan*, 1 Grat. 292.

2. A legacy being made payable on the legatees attaining the age of eighteen or marrying, the legatee cannot maintain a suit to recover the legacy before the happening of one or the other contingency. *Swope v. Chambers*, 2 Grat. 319.

3. In such a case, the suit being brought to recover the legacy, upon the pleadings, the court can not make a decree to have it secured. *Ibid*.

4. Until a contingent legacy is payable, the executor can not relieve himself and his sureties from responsibility for it, by paying it over to the guardian of the legatee. *Ibid*.

5. A bequest to a corporation of its own stock is valid. *Rivanna Nav. Co. v. Dawsons*, 3 Grat. 19.

6. A bill of exchange drawn by a legatee on the executor to the amount of the legacy, was held to be an equitable assignment of the legacy to the drawee. *Anderson et als. v. De Soer*, 6 Grat. 363. *Same v. Gallego's adm'r et als. id.*

7. Legacies are to be paid with interest, though the fund out of which they are to be paid does not bear interest. *Anderson, adm'r, &c., v. Burwell's ex'ors*, 6 Grat. 405.

8. A residuary legatee was barred by lapse of time, though another suit was pending by another legatee, to recover her legacy, and it was not ascertained until the decree in that case that there was a residuum. *Ibid*.

9. Testatrix bequeaths property to her married daughter for her separate use; so much thereof as may be in existence at her death to go to her children, or their descendants, if any there be. And to effect the purpose

of the bequest, she appoints a trustee, to whom the property is to be delivered by the executor. And she directs that all receipts given to the trustee by the daughter for payments made to her of principal or interest of the property, shall be to him a full discharge. The daughter is entitled to use both the principal and interest of the property at her discretion. *Brown v. George*, 6 Grat. 424.

10. When legatees will be entitled to increased value and must bear the loss of slaves divided by commissioners under an order of court, the loss happening before the report is confirmed. *Moore v. Thornton et als.*, 7 Grat. 99.

11. Specific legatees should be parties to a suit by residuary legatees against the executor for distribution of the estate unless it appears they have been paid. *Nelson's ex'or v. Page et als.*, 7 Grat. 160.

12. What is concluded by a decree against an administrator *de bonis non* of the heir of the executor, in a suit by legatees of the original testator. *Sheldon et als. v. Armstead's adm'r et als.*, 7 Grat. 264.

13. When legatees may unite in a suit to enforce a decree in their favor. *Ibid.*

14. When legatees should be subjected before the executor. *Ibid.*

15. When legatees of the heir should be subjected before the legatees of an executor. *Ibid.*

16. Testatrix gives a legacy, and directs it shall be paid within a year from her death. The legacy bears interest from the end of the year, though there is no hand to receive it. *Lyon's adm'r v. Magagno's adm'r.*, 7 Grat. 377.

17. Where there is no hand to receive a legacy, the executor should invest it in an interest bearing fund, or bring into court to be invested. *Ibid.*

18. The legatee having died shortly after the testatrix, and before a qualification of her estate in this country, and there having been no qualification on the estate of the legatee for twelve years, the act of limitations of 1826, does not bar the claim for the legacy. *Ibid.*

19. A legatee being dead, a decree for the distribution of the estate should be in favor of his personal representative, and not of his distributee. *Luster v. Middlecoff et als.*, 8 Grat. 54.

20. A testator devises a tract of land for payment of a particular debt, and the land is sold, but the creditor receives only the first payment of the purchase money, and the balance is applied to the payment of other debts of the testator. Whether or not the land was the primary fund for payment of the particular debt, the debt was in fact the debt of the testator's

estate, for which a legatee is responsible on his refunding bond. *Archer v. Archer's adm'r.*, 8 Grat. 539.

21. In a bill by persons claiming as legatees or assignees of legatees, against defendants as legatees or assignees of legatees under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption is, in the absence of all pleadings and proofs to the contrary, that the persons made parties to the suit as legatees, are not fictitious persons, or mere pretenders to the characters assumed in the proceedings. *Ball et als. v. Johnson's exors et als.*, 8 Grat. 281.

22. A testator gives his land to his wife for life, and at her death to his son J, and he gives his personal estate, after payment of his debts, to be equally divided among his eight children. The widow renounces the will, and takes her thirds of the real and personal estate. The rent of the two-thirds of the land not assigned to the widow, shall be applied to indemnify the legatees of the personal estate for the loss sustained by the widow's taking one-third of that fund. *McReynolds v. Counts et als.*, 9 Grat. 242.

23. After the legatees have been satisfied for the loss, or after the death of the widow, whichever event shall first occur, the said two-thirds is to be delivered to the remainderman. *Ibid.*

24. The word "loan" in a legacy of personal estate, construed to mean "give." *Parker and wife v. Wasley's ex'or et als.*, 9 Grat. 477.

25. A bequest of "all the money," held to include money deposited in a savings institution, but not debts due the testator. *Dabney et als. v. Cottrell's adm'r et als.*, 9 Grat. 572.

26. A testator charges his whole estate with the payment of debts. Lands devised and legacies must contribute ratably to pay the debts. *Elliott v. Carter et als.*, 9 Grat. 541.

27. D and A have each five children, and R is the child of A. Testator regards R with great favor, and gives him a farm and a legacy of \$2,000. He then says, "I bequeath to the children of A and D, and to R, all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them." The fund is to be divided into ten parts, one of which is to be given to each of the children of A and D; thus giving to R but one-tenth of the fund. *McMaster v. McMaster's ex'ors*, 10 Grat. 275.

28. What is an assent to a legacy by an executor. *Frazer's adm'r v. Beville et als.*, 11 Grat. 9.

29. An executor, though he assents to a legacy, does not thereby dispense with a refunding bond. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

30. If an executor has assented to a legacy, and waived a refunding bond, the specific legatee may sue at law for his legacy. *Ibid.*

31. The statute of limitations cannot bar the legatees' claim to his specific legacy, whilst it is held as such by the executor, though he has long since assented to the legacy. *Ibid.*

32. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor. *Ibid.*

33. A delay of seventeen years by a specific legatee to sue for his legacy, held under the circumstances, not to bar his claim. *Ibid.*

34. When a specific legatee is entitled to recover his legacy, though the executor has accounted for it to other parties under an award. *Ibid.*

35. When an assent to a legacy may be proved by one executor at the suit of the legatee, against the other executor and a purchaser under him. *Frazer's adm'r v. Beville et als.*, 11 Grat. 9.

36. When a contingent legatee of a remainder, may sue the legatee for life, and a purchaser under him to have the legacy forthcoming upon the happening of the contingency. *Ibid.*

37. Bonds of a legatee are given to him by the testator as a *donatio mortis couse*, with the intention that the legatee shall not account for them. They are not an advancement in satisfaction of his legacy. *Lee's ex'or v. Boak*, 11 Grat. 182.

38. Widow having renounced the will, and taken her distributable share of the personal estate, the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate. *Findley's ex'ors v. Findley*, 11 Grat. 424.

39. A legacy of a remainder in property, on condition that the legatee, a female, shall remain a member of the Society of Friends, there being but five or six single men, members of the society, in the neighborhood of the legatee, when she is of a marriageable age, is an unreasonable restraint upon marriage, and void. *Maddox et al. v. Maddox's adm'r et als.*, 11 Grat. 804.

40. There being no bequest over, and no specific direction that upon breach of the condition, the legacy shall fall into the residuum of the estate, the condition is *in terrorem* merely, and does not defeat the legacy. *Ibid.*

41. The bequest of a legacy being upon a condition requiring a religious qualification, the condition is against the policy of the law of Virginia, and therefore void. *Ibid.*

42. *Quære*: Whether if the condition be a condition precedent, the legatee can take the legacy free from the condition; or if the legacy lapses? And it seems the legatee will take the legacy of personal property; and a devise of land would fail. *Ibid.*



43. Testator by his will gave his wife a plantation, slaves, stock, &c., for life; and he then added: it is understood that my wife is to keep my children, and raise them, and give them sufficient schooling. **HELD:**

1st. The widow takes the bequest *cum onere*, and is bound to provide for the support and education of the children, in a manner suited to her circumstances.

2d. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not liable for the expenses of the child for board, clothing and education. *Ibid.*

3d. Executors pay the account out of the estate of the child in their hands and on her marriage, her husband gives them a receipt for the payment. The widow is not liable to the husband and wife for the amount. *Crawford's ex'or v. Patterson*, 11 Grat. 364.

---

## LIEN.

1. A decree, in a proceeding by foreign attachment, against an absent debtor, directs that the home defendant shall pay out of a particular fund, and that the plaintiff shall execute to the absent debtor, a bond with the condition prescribed by the statute; which is not done. The decree is no lien upon the real estate of the home defendant. *Enders v. The Board of Public Works*, 1 Grat. 364.

2. A decree in equity is a lien upon the equity of redemption of real estate, mortgaged for payment of debts. *Ibid.*

3. A deed executed before judgments have been obtained, against the grantor, under which the purchaser has been put into possession, and has paid the purchase money, but which was not recorded until after the judgments were obtained is void as against such judgment creditors, and the land conveyed thereby is subject to the judgments. *M'Clure v. Thistle's Ex'ors*, 2 Grat. 182.

4. The land is equally subject, in such a case, to satisfy a creditor, who has issued a *ca. sa.* upon his judgment, upon the service of which, the grantor in the deed has been discharged as an insolvent debtor. *Ibid.*

5. A judgment is a lien upon the lands owned by the debtor at the date of the judgment; and the judgment debtor having obtained an injunction to the judgment, which was afterwards dissolved, and the surety in the injunction bond having discharged the judgment on the injunction bond against him, he is entitled to the benefit of the creditors' judgment lien as against *bona fide* alienees of the land for value, subsequently to the original judgment. *Rodgers v. M'Cluer's Adm'rs et als.*, 4 Grat. 81.

6. The land last sold by the debtor is to be first applied to the satisfaction of the judgment. And this, though the last purchaser obtained a conveyance before the first, the first having previously had a good equitable title. *Ibid.*

7. A judgment creditor may subject his debtor's equitable interest in land sold by him, for the purchase money unpaid. *Withers v. Carter et als.*, 4 Grat. 407.

8. A purchaser of land, subject to the lien of a judgment is entitled to have the purchase money applied to satisfy the judgment. *Ibid.*

9. The original vendor has a lien on land sold for the unpaid purchase money, in the hands of the second vendee, although the second vendee had obtained the legal title and had no notice that the original purchase money was unpaid, if at the time of the sale to the second vendee, his vendor had not the legal title. *Burnes' ex'rs et als. v. Campbell*, 4 Grat. 125.

10. A tract of land is subject to a mortgage; the part last sold is primarily liable to satisfy the mortgage. *Henkle's ex'r, &c. v. Allstadt et als.*, 4 Grat. 284.

11. A father, indebted, purchases land, which is conveyed to the son, who gives a deed of trust to secure the balance of the purchase money. A decree against the father is a lien upon the whole equitable interest in the land. *Burbridge v. Higgins' adm'r*, 6 Grat. 119.

12. The lien is upon the land not only for the money of the father vested in the purchase, but for the whole interest in the land after the payment of the balance of the purchase money. *Ibid.*

13. A creditor may come into equity to enforce the lien of a decree upon land, though the decree has never been revived against the administrator of the debtor, and no execution has issued upon it. *Ibid.*

14. Among creditors proceeding by foreign attachment, the creditor whose subpoena is first sued out and served, is entitled to priority of satisfaction. *Farmers Bank v. Day et als.*, 6 Grat. 360.

15. The attachment only operates as a lien upon the debts and effects of the absent debtor, in the hands of the home defendants against whom it is issued and upon whom it is served. *Ibid.*

16. An attachment served upon the tenant of the absent debtor, is a lien only on so much of the rents as are due from the tenant at the time of the service; and not upon rents falling due afterwards. *Haffey, &c. v. Miller, &c.* 6 Grat. 454.

17. Property covered by various deeds of trust, which may be enforced at different periods, having been sequestrated at the suit of a judgment creditor of the grantor, when the court disposes of the trust subjects, and

the rents and profits thereof, the judgment creditor will only be entitled to the rents and profits of the different trust subjects up to the earliest period when either of the valid encumbrances covering the subject, was authorized to be enforced. And the different incumbrancers will each be entitled to the rents and profits of the subject covered by his deed, from the time he was authorized by the terms of the deed, to enforce it. *Lewis et als, v. Caperton's ex'ors et als*, 8 Grat. 148.

18. A vendor of lands retains the title in accordance with the contract. He has a lien on the land for the purchase money, as against creditors and incumbrancers of the vendee, and this, though the vendee has subsequently executed a deed, by which he conveys other property to secure the purchase money. *Ibid*.

19. There being several deeds conveying in succession the same property, and not merely the equity of redemption therein, every successive incumbrance binds all the property not absorbed in satisfaction of previous valid incumbrances. And if some of the incumbrances are declared void at the suit of a creditor of the grantor, such creditor is not entitled to have his debt substituted in the place of such void incumbrance to the extent thereof; but the subsequent valid incumbrances have preference. *Id*.

20. A forfeited forthcoming bond is a lien on the lands of the obligor from the time it is returned to the clerk's office. *Jones, &c. v. Myrick's ex'ors*, 8 Grat. 179. *Myrick's ex'ors v. Epes et als*, *Id*.

21. The lien of a forfeited forthcoming bond returned to the clerk's office during the term, and on which execution is awarded, does not relate to the first day of the term. *Ibid*.

22. Though a forthcoming bond is forfeited and not quashed, yet in equity the lien of the original judgment continues. *Ibid*.

23. Lands subject to the lien of a judgment, which have been sold or encumbered by the debtor, are to be applied to the satisfaction of the judgment in the inverse order in point of time of the subsequent incumbrances. *Ibid*.

24. A debtor contracts to give a lien on two adjoining tenements to secure a debt, and the creditor is in possession of one of the tenements, under an agreement by which the rent of the tenement is to be taken in satisfaction of the interest of the debt. Afterwards the debtor becoming embarrassed, conveys all his property in trust, to pay his debts. The creditor is entitled to enforce his equitable lien not only against the debtor, but his creditors. *Ott's ex'ix v. King et als.*, 8 Grat. 224.

25. The lien of attachment levied upon the interest of a wife in her father's estate in the hands of the executor, is terminated by the death of the husband pending the proceedings, his wife surviving him. *Vance v. McLaughlin's adm'r*, 8 Grat. 280.

26. A case in which, between two equities, the junior was preferred.  
*Cox et al. v. Romine*, 9 Grat. 27.

27. The vendee being insolvent, a contract between one of the executors of the vendor, and the second purchaser, which is doubtful in its import, will not be construed into an agreement to release the vendor's lien upon the land for the purchase money. *Stuart's ex'ors v. Abbott et al.* 9 Grat. 252.

28. If one of the executors does contract to release the lien, it being the only security for the debt, it will not be enforced in a court of equity against the executors. *Ibid.*

29. A judgment is a lien upon lands in the hands of a purchaser, though at the time of the purchase, the judgment was enjoined. And this, though the judgment was not docketed, the purchaser having had notice of it.  
*Craig v. Sebrell*, 9 Grat. 131.

30. Bonds assigned, being for the purchase money of a part of a tract of land, and the vendor selling the other part to a third person, the assignees being defeated in the recovery of the money from the vendee, whose bonds they held, have no lien on the purchase money of the other part of the tract. *Ragsdale v. Hagy and others*, 9 Grat. 409.

See JUDGMENTS.

---

## LIFE ESTATE.

A purchaser of a life tenant's interest in a slave sells her. He must account with the remaindermen for the value of the slave at the death of the life tenant, unless they consented to the sale. *Moore v. Thornton et als.*, 7 Grat. 99.

---

## LIMITATION OF ESTATES.

1. A testator gives an express estate in fee, in real and personal property, to each of his five sons; and then directs that "if any or either of his five sons die without issue living at the time of his death, all the estate, real and personal, of every such child shall be divided equally between the survivors or their representatives, according to the principles of the law of descents." On the death of one of the sons, without issue, the estate passes to the surviving children and to the descendants of such as are dead; the latter taking, as purchasers under the will, the share which the parent would have taken if alive. *Dickinson v. Hoomes*, 1 Grat. 302.

2. A testator after directing that all his estate shall be equally divided among his children adds: "it is my desire that if any of my children should

die before they attain to lawful age or without a lawful heir, in either case, that all such property, as they may receive in the division of my property, return to my surviving children or their lawful heirs." Held,—1. The limitation over takes effect upon the happening of either contingency. 2. The limitation does not operate to transfer the estate a second time. *Brooke v. Croxton et als.*, 2 Grat. 506.

3. A testator devises as follows: "I lend to my daughter Lucy my negro woman Sydney and her child Sarah, and negro boy named John, to her during her natural life, and to her heirs lawfully begotten on her body; and should my daughter or her husband dispose of, convey out of the way, conceal or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease and direct my executors to take them into possession. And in such case, after her decease, they and their increase to be divided among her children, if any living; otherwise to be divided among my children, J, E, P and C, and their heirs. Held: The daughter Lucy had but a life-estate in the slaves, and her children took in remainder as purchasers under the will. *Pryor v. Duncan*, 6 Grat. 27.

4. F, by his will, devises as follows: "I direct that my son P and my daughter E shall have the whole of my real estate, consisting of one hundred and four acres of land, during their natural lives, that is, if they remain single; but if either of them shall marry, either him or her, then his or her claim or benefit of the aforesaid land to be void; or if they both shall marry, then the land is to be sold as hereinafter directed." The after direction is: "That if P and E shall live and die single, then the land given to them for their lives shall be sold and the proceeds divided among the testator's children, and the children of such as are dead. On the death of P unmarried, E takes the whole of the land whilst she remains unmarried. *Fawver v. Fawver*, 6 Grat. 236.

5. Prior to 1819 a testator devises to his three daughters by name his estate, both real and personal, to them and their heirs lawfully begotten of their bodies. And in case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part. This is an estate tail, which by the statute is converted into a fee; and the limitation over is after an indefinite failure of issue, and void. *Nowlin and wife v. Winfree*, 8 Grat. 346.

6. On a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of any expression of a particular intention on the part of the testator, the survivorship has relation to the death of the testator. *Martin's adm'r, &c. v. Kirby, adm'r, &c., et als*, 11 Grat. 67.

7. The testator gives all his estate, real and personal, to his wife for and during her widowhood; and he directs that at her death all his estate shall be sold and equally divided between all his surviving children and their heirs. The children living at the death of the testator took a vested interest in the estate. *Ibid.*

Missing Page

an actual possession by residence, improvement, cultivation or other notorious and habitual acts of ownership for twenty-five years before suit brought. *Taylor's Devisees v. Burnside's*, 1 Grat. 165.

3. If the tenant or those under whom he claims, have abandoned their profession, within the twenty-five years, the statute is no bar to the demandant's title under his elder patent. *Ibid.*

4. The statute is not a bar, if the demandant, or those under whom he claims have, within twenty-five years before bringing the action, entered upon the land in controversy, and taken adversary possession thereof. *Ibid.*

5. The act 16th April, 1831, Sup. Rev. Code, ch. 109 § 31, p. 148, which limits the right of appeal to the Court of Appeals to five years, applies to the Commonwealth. *Commonwealth v. Moore*, 1 Grat. 294.

6. The act 8th March, 1826, Sup. Rev. Code, ch. 200, § 1, p. 260, for the limitation of actions against persons acting in a fiduciary character, only begins to run from the time, when the liability sought to be enforced, arises. *Cookus v. Peyton's ex'or.*, 1 Grat. 431.

7. The statute will not bar a suit by one partner against another, where it appears there were good debts outstanding, within five years before suit brought. *Marsteller v. Weaver*, 1 Grat. 391.

8. A vendor of real estate, retaining the title, the statute of limitations cannot be set up as a bar to his recovery of the purchase money. *Hopkin's adm'r v. Cockerell et als*, 2 Grat. 88.

9. The statute being pleaded by a defendant to a part of plaintiff's claim, and sustained, defendant's claims of same nature not allowed to be set off against plaintiff's specialty claims. *White v. Turner's adm'r*, 2 Grat. 502.

10. A fraudulent trust has been partially executed by the trustee, who does not refuse to complete it. The trust property having come into the hands of a part of the *cestuis que trust*, on a bill filed by the others to have the trust executed, against the *cestuis que trust* in possession, the statute of limitations is no bar. *Turner and wife v. Campbell et als*, 3 Grat. 77.

11. Judgments against absent debtors repel the statute upon the original cause of action. *Roote's ex'ix v. Tompkin's trustees*, 3 Grat. 98.

12. The limitation of seven years applies to decrees (so far as they operate upon a subject within the jurisdiction of the court) against absent debtors. *Ibid.*

13. The vendor of land having retained the title, the statute will not bar a suit for specific performance, and to subject the land to the payment of the purchase money. *Hanna v. Wilson*, 3 Grat. 243.

14. The statute does not apply to a suit by a ward, after coming of age, against the surety of the guardian, the ward having been delayed for more than ten years in prosecuting a suit against the administratrix of the guardian. *Roberts v. Colvin*, 3 Grat. 358.

15. Property conveyed in a deed of trust is taken and sold: after five years the purchaser is protected by the statute against the action of the trustee or *cestui que trust* to recover it. *Sheppards v. Turpin*, 3 Grat. 373.

16. A merely constructive trustee may protect himself by the statute. *Ibid.*

17. When the action of the trustee against third persons for the recovery of the trust property is barred by the statute, the action of the *cestui que trust* is equally barred. *Ibid.*

18. The act 1 Rev. Code, ch. 128, § 5, 489, limiting proceedings on judgments, applies to judgments "when assets," or "if assets," and begins to run from the date of the judgment. *Braxton v. Wood's adm'r*, 4 Grat. 25. *Smith's adm'r v. Charlton's adm'r*, 7 Grat. 425.

19. A suit upon a judgment suspends the operation of the statute during its pendency, but if it is dismissed, it will not prevent the bar of the statute to another suit by the same plaintiff after its dismissal. *Braxton v. Wood's adm'r*, 4 Grat. 25.

20. A direction in the will of the testator that his debts shall be paid will not prevent the bar of the statute as to personal estate. *Ibid.*

21. It seems that for the statute of limitations to be a good defence for the tenant in a writ of right, his possession must be adverse to, and not under the title of the demandants. *Robinett v. Preston's heirs*, 4 Grat. 141.

22. A co-parcener or tenant in common cannot protect himself by the statute of limitations against a co-parcener or co-tenant without an actual disseisin or ouster. *Purcell and wife et als v. Wilson*, 4 Grat. 16.

23. Trustees, by authority of an act of Assembly, sell and convey land, reserving a ground-rent to be paid to the proprietor of the land when he shall be ascertained. The statute does not bar the recovery. *Mulliday v. Machir's adm'r*, 4 Grat. 1.

24. The act limiting appeals to the court of appeals refers to the time of presenting the appeal to the court or judge in vacation; and if the petition is presented within five years from the date of the judgment or decree, the appeal is not barred by the statute. *Williamson v. Gayle et als*, 4 Grat. 180. Sed vide *Yarborough and wife v. Deshazo*, 7 Grat. 374.

25. The statute limiting the recovery of *mesne* profits may be given in



- evidence on the trial of a writ of right. *Purcell and wife et als v. Wilson*, 4 Grat. 16.
26. Where a defendant does not file a plea of set-off, but files his account and gives notice of set-off, the plaintiff cannot reply the statute of limitations, and he may therefore rely upon it in evidence. *Trimyer v. Pollards*, 5 Grat. 460.
27. If the set-off accrued before the action was brought, the period of limitation is five years before the commencement of the action. *Ibid.*
28. If the set-off accrued after the action was brought, the period of limitation is five years before plea pleaded, or account of off-sets filed. *Ibid.*
29. An endorsement of a note payable on demand, imports a guarantee of the note according to its terms, which cannot be altered by parol proof; and if an action on the guarantee is not brought within five years from the date of the note, it is barred by the statute of limitations. *Watson v. Hurt*, 6 Grat. 633.
30. Decree against administrator *de bonis non* appealed from and affirmed. As plaintiffs had no right to proceed against the prior executor's estate to have satisfaction of the decree until it was affirmed, the act of limitations of 1826 did not begin to run in favour of the prior executor's estate until then. *Sheldon et als v. Armistead's adm'r et als*, 7 Grat. 264.
31. When the act of limitations of 1826 will protect the sureties of an administrator *de bonis non*. *Ibid.*
32. A judgment *quando acciderint* does not come within the operation of the statute of limitations in relation to judgments. *Smith's adm'r v. Charlton's adm'r*, 7 Grat. 425.
33. A legatee having died shortly after the testatrix, who lived abroad, and before a qualification on her estate in this country, and there having been no qualification on the estate of the legatee for twelve years, the act of limitations of 1826 does not bar the claim for the legacy. *Lyon's adm'r v. Magagnos' adm'r*, 7 Grat. 377.
34. If upon appeal from a final judgment, &c., the appeal bond is not given within five years from the judgment, &c., the appeal will be dismissed. *Yarborough and wife v. Deshazo*, 7 Grat. 374.
35. The proviso in the act, Code, ch. 149, § 19, p. 540, does not extend to the law limiting and regulating appeals. *Ibid.*
36. Covenant between the maker and holder of a note that the note is to be held by the maker until his liability as bail of the holder ceases, and

that he then shall deliver it. The statute of limitations does not run from the time the covenant was executed until the liability of the maker as bail ceased. *Bowles' ex'or v. Elmore's adm'r*, 7 Grat. 385.

37. A promise which will remove the bar of the statute of limitations must be a promise to pay a particular debt. A promise to settle with the claimant is not enough. *Bell v. Crawford*, 8 Grat. 110.

38. If a part payment will take a case out of the statute, it must be a payment upon the specific debt, and not a payment upon account. *Ibid*.

39. The statute of limitations does not commence to run against the owners of the remainder in slaves, in favor of a purchaser of the life estate, until the death of the life tenant. *Ball et als v. Johnson, ex'or et als*, 8 Grat. 281.

40. A claim by an administrator for services rendered his testatrix, was barred by the statute as to all due more than five years before a suit brought against her in her life time. *Jones v. Jincey et als*, 9 Grat. 708.

41. In an action of assumpsit against an administrator, he pleads the statute of limitations. It is no answer to the plea that the defendant's intestate sold to the plaintiff, slaves in payment of the debt declared on; and that the defendant, since the death of his intestate, had as administrator sued for, and, upon the title alone, without regard to the intestate's indebtedness to the plaintiff, recovered the said slaves from the plaintiff within five years before the action brought. *Johnson's ex'x v. Jennings's adm'r*, 10 Grat. 1.

42. A party having conveyed slaves to his step-son, stating a valuable consideration in the deed, and remaining in possession for many years his possession is subordinate to the deed, and therefore, the step-son's title to the slaves is not barred by the statute of limitations. *Roberts v. King*, 10 Grat. 184.

43. The saving in the act of 1819, 1 Rev. Code, ch. 104, § 13, p. 378, in relation to wills, in favor of persons out of the State, is not repealed by the act of March 8th, 1826, Sup. Rev. Code, p. 260, in relation to the limitation of actions. *Schultz v. Schultz et als*, 10 Grat. 358.

44. From the time that land is forfeited to the Commonwealth, under the act of 1835, Sess. Acts, p. 11, time will not run in favor of a party in possession, against the Commonwealth or those claiming under her by patent. *Staats v. Board*, 10 Grat. 400. *Halc v. Branscum, id.* 418.

45. K, the owner of a slave for life in 1836, sells him to M, who in the same year sells him to J, who gives him to a daughter, by whom he is taken out of the State. K. dies in 1846, and then the owners of the remainder in the slave bring trover against M to recover the value thereof. **Held**: The plaintiffe cannot maintain trover against M; and if the sale

by M gave the plaintiffs the right to bring trover against M, the action is barred by the statute of limitations. *Philips et als v. Marteney's ex'or*, 10 Grat. 333.

46. No time runs against the Commonwealth. *Levasser v. Washburn*, 11 Grat. 572.

47. Though the statute had commenced to run against the true owner of land, yet upon a forfeiture under the delinquent land laws, it ceased to run until it was sold by the commissioner of delinquent lands. *Ibid.*

48. The statute cannot bar a legatee's claim to a specific legacy whilst it is held as such by the executor, though he had long since assented to the legacy. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

49. A decree obtained against an absent defendant by fraud is not protected after seven years, by the act, 1 Rev. Code, 1819, p. 475, § 4. *Evans et als v. Spurgin et als*, 11 Grat. 615.

50. W, administrator of S, assigns the bond of T to the executors of H, in discharge of a debt due from S to H. The executors sue T, and recover a judgment, and he enjoins it on the ground that S owes him for a legacy left him by R, of whom S was the executor, and the injunction is perpetuated. In this injunction suit, the executors of H and W, and the administrator *de bonis non* of S are parties, and the decree perpetuating the injunction is by consent, and they also consent to a decree, directing an account of S's estate by his administrator. Ten years after the decree, a second administrator *de bonis non* of S, enters into a contract under seal, to pay the debt out of the assets when received, and the executors of H agree to wait one year, to release their costs in the suits, and dismiss it as to them; but the administrator was not to be bound personally, and the executors were at liberty, if the money was not paid in the year, to cancel the agreement, and proceed to enforce any of their existing remedies. The administrator did not collect assets within the year, and the executors sued in equity upon the agreement. **Held:**

1st. Though the right of the executors of H to proceed against S's estate, accrued when the injunction was perpetuated, yet the pendency of that suit carried on for their benefit, prevented the running of the statute of limitations against them.

2d. Though it is generally true that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, on which a suit may be maintained. *Braxton's adm'r v. Harrison's ex'ors*, 11 Grat. 30.

50. The statute applies to a debt by parol, contracted by a party then living in Virginia, but who soon thereafter removed from the State, and

remained out of it until his death. *Markle's adm'r et als v. Burch's adm'r*, 11 Grat. 26.

51. A trust deed to secure a debt provides that the grantor shall retain the property until a certain time. Before that day he agrees to sell it at a certain price, and if the money and interest is not returned within twelve months, the agreement to stand as a bill of sale; and he delivers the property. Within five years from the time when the trustee might take the property, and from the end of the twelve months, but not from the date of the agreement, the trustee, who had no notice of the sale, takes possession of it and sells it to pay the debt. The title of the purchaser was not perfected by the lapse of time; and the trustee was entitled to take possession and sell under the trust deed. *Colvin v. Menefee*, 11 Grat. 87.

52. A party takes possession of land, claiming it under a lost will; and he files a bill to set up the will, which is afterwards dismissed for want of security for costs. The statute having commenced to run, the pendency of this suit did not stop it. *Caperton et als v. Gregory et als, lessee*, 11 Grat., 505.

53. The statute runs against *femes covert* and their husbands, so as to bar a recovery during coverture. *Ibid.*

54. The infant children of a female heir, who died a *feme covert*, are barred after three years from the death of their mother, though they may continue infants all the time. *Ibid.*

55. Upon a bill by the other heirs for partition against the party in possession, they are required to establish their title at law. If there was any equitable ground to repel the bar of the statute, the court in directing them to establish their title at law, should have given effect to it in its order; but this not having been done, the estate must have its legal effect on the trial at law. *Ibid.*

SEE ADVERSARY POSSESSION.

---

## LIS PENDENS.

1. Land on which an annuity is charged, having been sold pending a suit to recover the arrears of the annuity, it will be directed to be sold to satisfy the arrears of the annuity, without noticing the *pendente lite* purchaser. *Philips et als. v. Williams, &c.*, 5 Grat. 259.

2. A creditor of a deceased debtor sues heirs residing abroad to marshal the assets and subject lands or their proceeds in the State, descended to them. The lands have been sold under a decree at the suit of the heirs and are in the hands of a commissioner of the court, who is also administrator

of the deceased debtor. Though this person is a party as administrator, to the creditors suit, yet not being a party as commissioner, if he has no knowledge of the object of the suit and pays over the money to the heirs under the order of the court, whose commissioner he is, he will not be affected by the *lis pendens* of the creditors suit, so as to be held liable to pay it over again to the creditor. *Carrington et als. v. Didier, Norvell & Co.*, 8 Grat. 260.

---

### LOAN.

1. A loan can not be converted into a gift by the neglect of the agent conveying the property to the loanee, to inform him that it was intended as a loan. *Dickinson v. Dickinson's adm'r et als.* 2 Grat. 493.

2. Loaner dies within five years from the date of the loan and by his will disposes of the property loaned, of which the administrator of the loanee has notice. The property may be recovered after five years from the loan. *Ibid.*

3. A slave is loaned and remains in possession of the loanee for more than five years, and then the lender takes possession of him, creditors of the loanee may subject the slave to satisfy their debts. *Taylor v. Beale et als.*, 4 Grat. 93.

4. A debtor remaining in possession of slaves for five years under a parol loan, they are liable to satisfy his creditors, though possession is resumed by the lender, before executions are levied upon them. *Beale v. Digges et als.*, 6 Grat. 582.

See *CONTRACTS AND ENDERS v. BOARD OF PUBLIC WORKS*, 1 Grat. 364.

---

### MANDAMUS.

1. A writ of *mandamus* should not be awarded in any case where there is another remedy. *Goolsby, ex parte*, 2 Grat. 575.

2. The Supreme Court of Appeals has no jurisdiction either under the constitution or by statute, to issue a *mandamus* to a judge of a Circuit Court to compel him to try a cause depending in his court. *Barnett v. Meredith, Judge*, 10 Grat. 650.

3. A free negro convicted of the misdemeanor of remaining in the State, in violation of §§ 8, 9 ch. 198 of the Code, is entitled as of right to an appeal from the decision of the justice, to the court of the county or corporation in which his conviction was had, and if the appeal is refused by the justice, he may have relief by *mandamus* from the Circuit Court; and if the Circuit Court refuses the *mandamus*, an appeal lies to the Court of Appeals. *Morris, ex parte*, 11 Grat. 292.

4. It seems that the county court will be compelled by mandamus to act upon an application for a license to keep a tavern, but will not be compelled to grant it. *Yeager, ex parte*, 11 Grat. 655.

---

### MARRIAGE.

1. Upon a prosecution for marriage, within the prohibited degrees, parties may appear by attorney and plead guilty, and the court may thereupon pronounce sentence of nullity. *Kelly v. Scott*, 5 Grat. 479.

2. A judgment declaring a marriage null is valid, though it does not proceed to punish the parties. *Ibid.*

3. A marriage within the prohibited degree being declared null, the husband has no interest in the property which was the property of the wife at the time of the marriage. *Ibid.*

4. A legacy of a remainder in property, upon condition that the legatee, a female, shall remain a member of the society of friends; there being but five or six single men, members of the society, in the neighborhood of the legatee, when she is of marriageable age, is an unreasonable restraint upon marriage and void. *Maddox et als. v. Maddox's adm'r et als.*, 11 Grat. 804.

5. There being no bequest over and no specific direction that upon breach of the condition, the legacy shall fall into the *residuum* of the estate, the condition is *in terrorem* merely, and does not defeat the legacy. *Ibid.*

---

### MARSHALLING ASSETTS.

1. The creditor of a deceased debtor may proceed in equity against his heirs residing abroad, as absent defendants, to marshal the assets and thus subject the lands or its proceeds, in the State, descended to them from the debtor. *Cunningham v. Didier, Norvell & Co.*, 8 Grat. 260.

2. If the land has been sold under a decree, in a suit by the heirs, and the proceeds are in the hands of a commissioner of the court, he should be a party as such, and be restrained by injunction from paying away the money in his hands. *Ibid.*

3. Though the commissioner is a party as administrator of the deceased debtor, if he has, in fact, no knowledge of the object of the suit and pays over the money to the heirs, under an order of the court, whose commissioner he is, he will not be liable to pay it again to the creditor. *Ibid.*

4. A principal executes a bond, binding his heirs to his surety, as

endorser, with condition that he will, when requested by the bank or the surety, pay off the notes, and so indemnify and save the surety harmless; and he dies leaving the notes not yet due, which are protested as they fall due, and are afterwards paid by his administrator. The surety being entitled to resort to both the real and personal estate, and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled, to the extent of the notes so paid, if they do not exceed the penalty of the bond. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

5. Upon a bill by simple contract creditors to marshal assets, it is competent for the court, in its discretion, to decree a sale of real estate in the hands of the heirs, though some of them are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of the debts chargeable upon the lands of the decedent. *Idem*, 496.

---

### MESNE PROFITS.

Persons who have been held as slaves, recovering their freedom, are in no case entitled to recover *mesne* profits. *Peter et als. v. Hargrave et als.*, 5 Grat. 12.

---

### MILLS.

1. On an application for leave to build a mill or other machine, the petitioner must show he has proceeded in the mode prescribed by law, for his particular case. *Whitworth et ux. v. Puckett*, 2 Grat. 528.

2. If a party applying for leave to build a mill owns the land on only one side of the stream, the proceedings should be under § 1, 2, 3, ch. 235, 2 Rev. Code; and if in such case he proceeds under § 4 of the act, the Court should quash the writ and inquisition. *Ibid.*

3. If it appears upon the hearing of the case, that a greater quantity of the land adjoining will be overflowed by the erection of the dam, than the jury estimated, the inquisition should be quashed and a new writ directed. *Ibid.*

4. The county court has no authority to increase or diminish the damages to the adjoining proprietors, assessed by the jury. *Ibid.*

5. The applicant for leave to erect a mill or other machine, is not entitled to the ownership of the land overflowed by the erection of the dam, upon paying the damages assessed by the jury. *Ibid.*

6. A jury of inquest in a mill case are induced, by the opinions expressed

and facts stated by the father of the applicant, to report that no person will sustain damage from the dam allowed to be built, and the inquisition is confirmed by the court. This inquest and judgment is no bar to an action for damages sustained by the father against a vendee of the mill, which were not actually foreseen and estimated by the inquest. *Calhoun v. Palmer*, 8 Grat. 88.

7. The defendant relies on the inquisition and judgment authorizing the dam, as the grounds of his defence; he cannot, therefore, deny the ownership of the land by the applicant for the mill. *Ibid*.

8. The conduct of the father does not defeat his right to recover damages for the injury he has sustained. *Ibid*.

9. Where a mill owner does not raise his dam at first as high as he is authorized to do, that will not preclude him from raising it to the full height authorized by the inquest, provided he does not thereby occasion injury to others. *Ibid*.

10. The father having united in the conveyance of the mill to the vendee, he cannot recover damages for any injury done to him by the erection of the dam, to the extent the injury existed at the time of the conveyance. *Ibid*.

11. In a petition for leave to erect a dam, the petition, which was *ore tenus*, states that the applicant is owner of the banks on both sides of the stream. This is, in effect, a statement that he is owner of the land. *Mairs v. Gallahue*, 9 Grat. 94.

12. The petition states that the applicant desired a writ of *ad quod damnum* to issue, for the purpose of erecting a grist mill, &c. This is a sufficient compliance with the statute. *Ibid*.

13. When, upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient. *Ibid*.

14. When neither the petition nor the order of the court directing the writ of *ad quod damnum* to issue, specifies the height of the dam proposed to be erected, it is proper for the jury to specify it in the inquisition. *Ibid*.

15. There is an exception for the refusal of the county court to continue the cause, on account of the absence of a material witness. On appeal to the circuit court by the exceptant, the witness is present and examined, and the judgment of the county court is affirmed. The want of the witness' testimony in the county court, is no ground of complaint in the court of appeals. *Ibid*.

16. An exception is taken to the judgment of the county court authorizing the erection of the dam, on the ground that it will be injurious to



the health of the neighborhood, and the evidence is stated. The circuit court passes upon that question upon full evidence, and there is no exception. The court of appeals must presume these courts decided right. *Ibid.*

17. The judgment of the court, giving leave to erect the dam, provides that the applicant shall keep a ferry boat at the crossing of a public road over the stream across which the dam is to be erected. This is authorised by the act, 2 Rev. Code, p. 277, § 5; and as the county and circuit courts have held, upon the proofs, that a ferry boat will be sufficient to accommodate the public, the court of appeals will presume they acted rightly, nothing being shewn to the contrary. *Ibid.*

18. The duty of keeping up the ferry boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition and incident of the grant, and attaches to it, into whatever hands it may pass. *Ibid.*

19. The kind of boat to be kept must be such an one as the exigencies of the travel and trade on the road shall require. *Ibid.*

20. It is the duty of the party required to keep up the ferry boat to ferry the public over the stream without charge. *Ibid.*

---

### MINISTERS OF THE GOSPEL.

The salaries of ministers of the Gospel are not taxed under the act of February 28th, 1846. *Plumer's case*, 3 Grat. 645.

---

### MISTAKE.

1. A court of equity will correct a mistake, either of law or fact, made by the scrivener in drawing a deed, against *bona fide* creditors of the grantor. *Alexander & Co. v. Newton et als.*, 2 Grat. 266.

2. Under a mutual mistake of the parties, as to the interest of the vendor in the land sold, a court of equity will, under the circumstances, set aside the sale entirely. *Irick and wife v. Fulton's ex'ors.*, 3 Grat. 193.

3. A grantor in a deed intended for the benefit of the *cestui que trust*, may maintain a suit to set aside the deed, and have the trust deed corrected, on the ground that it was not prepared according to her directions, and does not effect her intentions. *Shepherd v. Henderson et als.*, 3 Grat. 367.

4. If, owing to a want of skill or mistake of the draftsmen, the deed has

failed to carry out the clear intent of the parties, as manifested on its face, a court of equity will not interfere to defeat the intent of the parties, but will leave the creditor to his legal remedies; if he has any. *Perkins' trustee v. Dickinson & Co.*, 3 Grat. 335.

5. A court of equity will enjoin a judgment, and grant a new trial on the ground of mistake by the jury, ascertained by after discovered evidence. *Rust et als. v. Ware*, 6 Grat. 50.

6. Under the circumstances, a new trial was awarded on the testimony of jurors, that they rendered their verdict under a mistake as to its legal effect. *Moffet v. Bowman*, 6 Grat. 219.

7. A party to a compromise entered into in ignorance of important facts connected therewith, will not be held to be bound by it. *Ross' ex'or v. McLauchlan's adm'r et als.*, 7 Grat. 86. *Same v. Haden's adm'r. id.*

8. A mistake in respect to the title to land is no ground for relief to a purchaser, where he purchased the land without agreement, express or implied, for a conveyance with warranty of title. *Sutton v. Sutton*, 7 Grat. 234.

9. The object of a trust being to sell for what the property will bring, and there being no warranty by the grantor of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of land. *Ibid.*

10. Under the circumstances, a court of equity restricted the assignment of a security to the purpose of fully satisfying the assignee for the purposes of the assignment; the assignment having been made by the assignor under a misapprehension of the amount of the security. *Jennings v. Palmer*, 8 Grat. 70.

11. In a written contract for the sale and purchase of land by the acre, the purchaser will not be relieved in equity on the ground of mutual mistake as to the boundaries of the land, unless the mistake is fully and clearly proved. *Lea's ex'or v. Eidson*, 9 Grat. 277.

## MISDEMEANOR.

1. The false swearing before a clerk that a person applying for a marriage license is over twenty-one years of age, whereby the person applying is enabled to obtain a marriage license and the marriage takes place, is a misdemeanor, but not perjury. *Matthew Williamson's case*, 4 Grat. 554.

2. On a prosecution under the act of 1847-'8, ch. 10, § 24, for furnishing a free person who, by speaking or writing shall maintain that owners have no right of property in their slaves, it is incumbent on the Commonwealth

to show that in the alleged speaking, the defendant denied the right of owners to property in their slaves, and also to show that that denial was maintained by him. The language must plainly express the denial, or in its plain meaning necessarily imply it. *Bacon's case*, 7 Grat. 602.

3. A presentment for a misdemeanor is the commencement of the prosecution; and unless the prosecution is then barred by the statute of limitations, it will not be barred by the failure to file an information or indictment on the presentment before the time of limitations runs out. *Christian's case*, 7 Grat. 631.

4. In cases of misdemeanor, the court has authority to discharge the jury without the consent of the defendants. *Dye's case*, 7 Grat. 662.

5. Though the mere breaking and entering the close of another, is not a misdemeanor, yet if that entry is attended by circumstances constituting a breach of the peace, it will become a misdemeanor for which an indictment will lie. *Henderson's case*, 8 Grat. 708.

6. The going upon the porch of another man's house, armed and from thence shooting and killing a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of females in the house, is a misdemeanor for which an indictment will lie. *Ibid.*

## MORTGAGE.

1. A court of equity may sequester the rents and profits of mortgaged or encumbered property, where a forfeiture has accrued; and such rents and profits are necessary to discharge the incumbrances. *Clarke v. Curtis*, 1 Grat. 289.

2. The rents and profits received by the mortgagor or equitable owner, in possession, or which have accrued before an order of sequestration is made, can not be recovered from him by the mortgagee, or vendor. *Ibid.*

3. A mortgage by a public company to secure a loan, made by authority of an act of the legislature held to be valid. *Enders v. The Board of Public Works*, 1 Grat. 364.

*Quære*: If a mortgage by a public company, which may disable it from performing its duty to the public, would be valid without an express authority from the legislature. *Ibid.*

4. A married woman having given a mortgage on her separate estate to secure a debt, afterwards obtains a further loan from the creditor. Her trustee will not be allowed to redeem the mortgage without paying the debt subsequently contracted. *Woodson trustee v. Perkins et als.*, 6 Grat. 615.

5. When a mortgagee may come into equity for relief against a claimant of the mortgaged property, instead of trying the question at law. *Henley's adm'r v. Perkins et als.*, 6 Grat. 615.

See TRUSTS AND TRUSTEES.

---

### MOTIONS.

1. A motion may be made by a high sheriff against his deputy, for failing to pay money received on an execution, though the high sheriff has discharged the judgment against himself. *Weaver v. Skinner*, 4 Grat. 160.

2. Upon such motion the high sheriff can only recover the amount of the judgment against himself; and not interest on the aggregate amount of principal and interest. *Ibid.*

---

### MULTIFARIOUSNESS.

Legatees having obtained a decree ascertaining the rights of all, on a bill to enforce the decree, they seeking satisfaction out of a common fund, it is proper for all of them to unite in one suit to get the benefit of the former decree in their favor: and the bill is not multifarious. *Sheldon et als. v. Armistead's adm'r et als.*, 7 Grat. 264.

---

### MURDER.

1. When a homicide is proved, the presumption is, it is murder in the second degree. If the Commonwealth would elevate it to murder in the first degree, she must establish the characteristics of that crime. And if the prisoner would reduce it to manslaughter, the burden of proof is on him. *Hill's case*, 2 Grat. 594.

2. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any or upon very slight provocation, is *prima facie*, a wilful, deliberate and premeditated killing and throws upon the prisoner the necessity of proving extenuating circumstances. *Ibid.*

3. The rule of law is that a man shall be taken to intend that which he does; or which is the immediate or necessary consequence of his acts. *Ibid.*

4. It is not necessary that the clerk should include involuntary manslaughter in his charge to the jury on a trial for murder. *M<sup>r</sup> Whirt's case*, 3 Grat. 594.

5. Murder and manslaughter distinguished and defined. *Ibid.*

6. A father is informed on the evening of one day, that his son, a small boy, has been wantonly whipped by a man. He meets the man on the evening of the next day, and then with his fists and feet beats and stamps him, whilst he is unresisting, with so much violence that the man dies from the effects of the beating the next night. This is murder. *Ibid.*

7. In trials for murder, the jury is the proper tribunal to weigh the facts and circumstances, as well as the testimony in the case. And the court cannot undertake to set aside the verdict because the jury have decided against the evidence or without evidence. *Ibid.*

8. A person neither assaulted nor threatened gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them. It is murder. *Johnston's case*, 5 Grat. 660.

9. A new trial was granted to a prisoner convicted of murder in the first degree, after two concurring verdicts approved by the judge who presided at the trial the evidence being wholly insufficient to sustain the verdict and judgment. *Grayson's case*, 7 Grat. 624.

10. The killing of a slave by his master by wilful and excessive whipping is murder in the first degree, though it may not have been the intention of the master to kill the slave. *Souther's case*, 7 Grat. 673.

---

## NEW TRIALS.

(*Civil.*)

1. A new trial will not be granted on the ground of after discovered evidence, upon the affidavit of a party, that he has been informed and believes, that certain witnesses will give important testimony, without proof by affidavit of the persons or others who have heard them, of what they will state; and especially if their evidence is merely cumulative, and the cause has been pending for a length of time, and these newly discovered witnesses live in the county, and within a few miles of the party who makes the application. *Nuckol's adm'r v. Jones*, 3 Grat. 267.

2. If an opinion or instruction of the court, given on a former trial, is relied on before the jury on the second trial, by the party in whose favor the opinion or instruction was given, without asking for the same from the court, and a verdict and judgment are rendered for him, the appellate court will consider the opinion or instruction so relied on; and if it is erroneous, will reverse the judgment, and award a new trial. *Crawford v. Morris*, 5 Grat. 90.

3. An exception to the opinion of the court refusing a new trial, states all the evidence on the trial, instead of the facts. The appellate court cannot consider the parol evidence of the appellant; but upon the written evidence and the parol evidence of the appellee, the verdict was erroneous, the judgment will be reversed and a new trial awarded. *Pasley v. English et als.*, 5 Grat. 141.

4. An injunction to a judgment will not be allowed when there has been neglect in making defence at law. *Griffith v. Thompson*, 4 Grat. 147.

5. A court of equity will enjoin a judgment on the ground of a mistake by the jury, ascertained by after discovered evidence. But the subject of the action being accounts, the court will not direct a new trial; but will refer the accounts to a commissioner, and will itself give the proper relief. *Rust et als. v. Ware*, 6 Grat. 50.

6. Under the circumstances, a new trial was awarded on the testimony of jurors, that they rendered their verdict under a mistake as to its legal effect. *Moffet v. Bowman*, 6 Grat. 219.

7. What is not a surprise for which a new trial should be granted. *Harnsbarger's adm'r v. Kinney*, 6 Grat. 287.

8. A verdict which is in all respects fair, and in the judgment of the court which tried the cause, in conformity to the evidence, will not be set aside on the testimony of a few of the jurors, that they had been induced to agree to the verdict under a misapprehension of an instruction of the court. *id.*

9. If there is not sufficient grounds for setting aside a verdict generally, it is error to set it aside to enable the defendant to withdraw his pleas and confess a judgment with a view to resort to a court of equity for relief *id.*

10. A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, the verdict should be set aside, and a new trial awarded. *McDowell's ex'or v. Crawford*, 11 Grat. 277.

(*Criminal.*)

1. The legislature has given to the jury the power of fixing the time for which the prisoner is to be confined in the penitentiary. The exercise of a power by the courts to disturb the verdict of jurors in this respect, would be one of great responsibility; and one which the court can never be disposed to usurp. *M'Whirt's case*, 3 Grat. 594.

2. In trials for murder the jury is the proper tribunal, to weigh the facts and circumstances, as well as the testimony in the case. And the court cannot undertake to set aside the verdict because the jury have decided against the evidence or without evidence. *id.* *Grayson's case*, 6 Grat. 712.

3. The absence of a material witness, taken sick during the trial of the prisoner, is not cause for a new trial, the same facts which he would have deposed to having been deposed to by other unimpeached witnesses. *Young's case*, 4 Grat. 550.

4. On the trial of an indictment for obstructing the public highway, it is no reason for a new trial on the ground of surprise, that the defendant was mistaken as to the point where the obstruction was charged to be, and so was not prepared to defend himself. *Wholford's case*, 4 Grat. 553.

5. On an indictment for unlawful stabbing, under the statute of *Virginia*, a verdict of "guilty of unlawful stabbing" will not authorize a judgment; but the court should direct a new trial. *Marshall's case*, 5 Grat 663.

6. The general court having reversed a judgment and directed a new trial, the correctness of that judgment cannot be questioned either by the court below, or the general court upon a second writ of error. *id.*

7. New trials are grantable at the instance of the accused in all criminal cases. *Grayson's case*, 6 Grat. 712.

8. Motions for new trials are governed by the same rules in criminal as in civil cases. *id.*

9. A new trial will be granted when the verdict is against law; or when it is contrary to the evidence, or when it is without evidence. *id.*

10. Where some evidence has been given which tends to prove the facts in issue; or the evidence consists in circumstances and presumptions, a new trial will not be granted merely because the court, if on the jury, would have given a different verdict; the evidence should be plainly insufficient; and this applies *a fortiori*, to an appellate court. *id.*

11. When the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or *super-deas*, or examinable by an appellate court. *id.*

12. When the evidence is contradictory, the court which tries the case cannot be required to state in a bill of exceptions either the evidence or the facts proved by the witnesses respectively; it is enough to state that the evidence was contradictory. *id.*

13. A new trial was granted to a prisoner convicted of murder, in the first degree, after two concurring verdicts approved by the judge who presided at the trial, the evidence being wholly insufficient to sustain the verdict and judgment. *Grayson's case*, 7 Grat. 613.

14. A venire-man having expressed himself before the jury were impaneled as determined to punish the prisoner if taken upon the jury, not from any malice towards him, but from an opinion of his conduct, is no

ground for setting aside the verdict and granting a new trial. *Curran's case*, 7 Grat. 619.

15. After-discovered evidence, in order to afford a proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it, could not have secured at the former trial; must be material in its object, and not merely cumulative and corroborative or collateral; and must be such as ought to be decisive, and productive on another trial, of an opposite result on the merits. *Thompson's case*, 8 Grat. 637.

16. Where the sole object and purpose of the new evidence is to discredit a witness on the opposite side, the general rule is subject to few exceptions, to refuse a new trial. *id.*

17. What separation of a jury on trial for felony is not sufficient to entitle the prisoner to a new trial. *id.*

18. Jurors concurring in the guilt of the prisoner, each sets down the time for which he thinks he should be confined in the penitentiary and the aggregate is divided by twelve; and after the result is ascertained they all concur in it as their verdict. This is not misbehaviour in the jury which will entitle the prisoner to a new trial. *id.*

19. It is not misbehaviour in a juror, between the adjournment of the court in the evening and its meeting next morning, to drink spirituous liquors in moderation. *id.*

20. And it is not misbehaviour for which a new trial will be granted, though they drink upon the invitation of a witness for the Commonwealth, if it is done in the presence of the sheriff, and where the invitation to do so is obviously merely intended as an act of courtesy. *id.*

21. In walking out for exercise the jury with the sheriff pass beyond the limits of the county in which the prosecution is pending. This is no ground for a new trial. *id.*

22. A sheriff to whom a jury is committed in the progress of a criminal trial, walks out with them to a neighbouring house, and while there withdraws from the room where they are, leaving them in the company of three other persons. Although these other persons swear that there was no allusion by them to the trial during such absence of the sheriff, yet the verdict of the jury is to be set aside and a new trial awarded. *Wormley's case*, 8 Grat. 712.

23. In a prosecution under the act, Code ch. 199, § 25, p. 752, to subject the prisoner to additional imprisonment on a second conviction for a felony, the indictment in that respect being defective, and evidence having been improperly admitted to prove a former conviction, the whole judgment must be reversed, and a new trial awarded. *Rand's case*, 9 Grat. 738.



## NOTICE.

1. A notice on a forfeited forthcoming bond to a regular term of the court, which is not held, will authorize an award of execution thereon, at a special term. *Wootton v. Bragg*, 1 Grat. 1.

2. An endorser, residing in a district, passing under a particular name and having a post-office within it, and living equidistant from that post-office and another, out of the bounds of the district, a notice sent to the first office is sufficient. *Rand v. Reynolds*, 2 Grat. 171.

3. The Court of Appeals will presume that a deposition has been taken upon a regular commission and notice, when no objection, for want of notice has been made in the court below. *Pollard's heirs v. Lively*, 2 Grat. 216.

4. The affidavit of a notary is only evidence of the facts stated in the protest.\* *Walker v. Turner*, 2 Grat. 534.

5. A paper not being negotiable, the endorser is not entitled to notice of nonpayment. *Pitman v. Breckenridge & Crawford*, 3 Grat. 127.

6. The registry of a deed conveying by general description, without designating the land conveyed, is not notice in law, to a subsequent purchaser of the existence of said deed. *Mundy v. Vawter*, 3 Grat. 518.

7. Actual notice of such a deed and of its contents, will not affect a subsequent purchaser, unless he had notice that the land purchased by him was embraced by the deed. *Ibid.*

8. One joint notice to a constable and his sureties, upon the default of the constable in several cases is sufficient, and a separate judgment should be given in each case. *Hendricks v. Shoemaker*, 3 Grat. 197.

9. A commissioner to whom accounts are referred, gives notice to the parties by publication in a newspaper. Exception for want of personal notice should not be sustained unless the party excepting shows by affidavit or otherwise that he had no notice. *McCandlish, adm'r v. Eldoe et als*, 3 Grat. 330.

10. In taking an account, a commissioner may take depositions under his general notice. *Ibid.*

11. The order of a County Court directing justices to be summoned to consider of a verdict in ferry cases, may be executed by leaving notice in the mode prescribed in the general law in relation to notices. *Somerville v. Wimbush*, 7 Grat. 205.

12. A notice on a forthcoming bond is not defective because it only men-

\* See Code of Va., Ch. 144, § 7, p. 581-2.

tions those obligors in the bond, to whom the notice is intended to be given. *Booth v. Kinsey*, 8 Grat. 560.

13. A guarantor undertaking to pay upon reasonable notice of the failure of the principal to pay when due, dispenses with notice of acceptance; and what is reasonable notice is a question for the jury. *Wadsworth et als v. Allen &c.*

14. In an action on a bill of exchange, by the endorsee against the endorser, when the notice should be sent by mail, and it has not arrived at the endorsee's post-office, in the regular course of mail, the *onus* is upon the plaintiff to prove that it was mailed in time. *Friend v. Wilkinson & Hunt*, 9 Grat. 31.

15. No time being fixed by statute, within which notice to establish a landing shall be given the proprietor, if the notice is served, before the return day, he must show that it was insufficient. *Muire v. Falconer et als*, 10 Grat. 12.

16. In such a case, a party appearing and defending the establishment of the landing, without objecting to the sufficiency of notice, cannot raise the objection of want of notice in the Appellate Court. *Ibid.*

17. The affidavit of a witness that he was unable to attend the court, not having been objected to in the court below for want of notice, cannot be objected to in the Appellate Court. *Taylor v. Smith*, 10 Grat. 557.

18. What is sufficient notice to the endorser of the refusal of a drawee to accept a bill drawn in Virginia upon a merchant in London. *Stainback v. Bank of Va.*, 11 Grat. 260.

19. If a tenant claims to hold adversely to his landlord, he is not entitled to a notice to quit. *Harrison v. Middleton*, 11 Grat. 527.

20. An agreement by a tenant, under seal, that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will or by sufferance, and he is not entitled to the legal notice to quit. *Ibid.*

---

## NUISANCES.

If an individual, without authority, for his own purposes, or even for the public advantage, constructs a bridge in a public highway, it is incumbent in him to keep it in such condition as not to impede the free and convenient use of the highway; and if he suffers it to become ruinous, so as to be an obstruction, he is guilty of a nuisance, for which he is liable. *Sampson v. Goochland justices*, 5 Grat. 241.

## OATHS.

1. A clerk has no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties. *Matthew Williamson's case*, 4 Grat. 554.

2. The authority of a clerk to administer an oath, only extends to cases in which, without regard to circumstances, the taking the affidavit is a necessary prerequisite to the performance of an official act. *Ibid.*

3. The swearing falsely before a person not authorized to administer the oath, is not perjury. *Ibid.*

4. The false swearing before a clerk that a person applying for a marriage license is over twenty-one years of age, and thereby obtaining the marriage license, and the marriage takes place, is a misdemeanor.

---

 ORDINARIES.

1. The act, Code, ch. 96, § 3, p. 443, vests in the County Courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion, they cannot be controlled by the Circuit Courts, either by *mandamus*, writ of error, or *certiorari*. *Yeager, ex parte*, 11 Grat. 655.

2. Though the applicant for a license to keep a tavern may bring himself fully within and up to all that the statute requires, so that the County Court may properly grant him the license, if they think fit, he does not thereby acquire any such right to a license as that the County Court may be coerced to grant it. *Ibid.*

3. It seems that a County Court is bound to act upon every application for a license that is made to it; and if it refuses to act, the Circuit Court will compel it by *mandamus*. But when the County Court does act, its decision is beyond control. *Ibid.*

---

 OVERSEERS OF THE POOR.

1. Under an order of the County Court, directing the overseers of the poor to bind out a bastard child, one overseer may execute the indenture. *Brewer v. Harris et als*, 5 Grat. 285.

2. The County Court makes an order against the putative father of a bastard child, that he shall pay to the overseers of the poor twenty dollars a year for seven years. Though the overseers of the poor may never have paid anything for the support of the child, they are entitled to recover

these annual sums from the putative father. *Willard v. Overseers of Poor of Wood County*, 9 Grat. 139.

3. Upon an appeal by the overseers of the poor from a judgment of the County Court in such a case, the Circuit Court upon reversing the judgment, should not send the case back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. *Ibid.*

## PARCENERS.

1. A special verdict on a writ of right between co-parceners, or tenants in common, where the defence is the statute of limitations, must find either an actual disseisin or ouster of the demandants, or of those under whom they claim, or facts which in law constitute such actual disseisin or ouster. *Purcell and wife et als v. Wilson*, 4 Grat. 16.

2. Though a great lapse of time and other circumstances may warrant the presumption of a disseisin or ouster by one coparcener or tenant in common of another, not laboring under disabilities, this presumption is matter of evidence for the consideration of the jury, and not a matter of law for the judgment of the court on a special verdict. *Ibid.*

3. One of two co-parceners contracts to sell a small part of a tract of land, professing to act for both, though without authority; and the other parcener does not consent to the sale. Both co-parceners afterwards convey the whole tract to a grantee having full knowledge of the previous contract. The land first sold is but a small part, either in quantity or value, of one moiety of the tract. The grantee of the whole tract will be compelled in equity to perform the agreement of his grantor. *McKee v. Barley*, 11 Grat. 340.

## PARENT AND CHILD.

1. In a case of *habeas corpus* to obtain possession of a child by a mother, the father being dead, the petition may be in the name of the mother and a second husband. *Armstrong v. Stone and wife*, 9 Grat. 102.

2. The father being dead, the mother is entitled to the custody of the child, as of right, and she is not deprived of it by a second marriage. But when she is seeking by the writ of *habeas corpus* to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of the mother. *Ibid.*

## PARTIES.

1. Slaves emancipated by will are not proper parties to a bill filed to contest its validity. *Coalter's ex'or v. Bryan and wife et als*, 1 Grat. 18.

2. During the pendency of a suit in a court of equity, against the distributees of an intestate debtor, by his creditor, the estate of the debtor is committed to the sheriff; who, without amendment of the bill or issue of process against him, comes in and files his answer, and no objection is taken to his so doing in the court below. An appellate court will not reverse a decree against distributees on that account. *Hairston v. Medley*, 1 Grat. 96.

3. A bill in equity charges that a person, through whom a defendant received money, sought to be recovered, disclaimed any interest in it, and directed defendant to deliver it to plaintiffs. Upon demurrer to bill: Held such person not a necessary party. *North-western Bank v. Nelson*, 1 Grat. 108.

4. Justices who appoint a guardian and take insufficient security from him, are not proper parties to a suit for the settlement of his guardianship account. *Austin v. Richardson*, 1 Grat. 310.

5. The clerk who takes a defective bond from a guardian, not a proper party to such suit. *Ibid*.

6. Where a person has a mere interest in the question involved in a suit in equity, arising out of a collateral liability, though the decree may, upon that question, be evidence for or against him in some future controversy, such interest does not render him necessarily or properly a party. *Ibid*.

7. In a suit by a judgment creditor to subject lands in the hands of a *bona fide* purchaser from the debtor, pending the suit the purchaser dies—his heirs are necessary parties. *Taylor's adm'r v. Spindle*, 2 Grat. 44.

8. A will was executed in 1802. The testatrix died in 1815. In 1827 the creditors of one of the administrators filed a bill to subject his property which he had conveyed in trust to indemnify his sureties in his administration bond, to the payment of his debts. The legatees mentioned in the will not having been heard of up to that time, are not necessary parties to the suit. *Jones v. Lackland et als*, 2 Grat. 81.

9. A bill is filed by two executors against the creditors of their testator, for administration of his estate in equity. The accounts are taken and the cause is ready for hearing, when one of the executors dies. Without being revived against his representative, a decree is made against the surviving executor, who takes an appeal. It is too late to object in the appellate court, that the suit was not revived against the representative of the deceased executor. *Kee's ex'or v. Kee's creditors*, 2 Grat. 116.

10. In a suit by an insolvent debtor to compel payment of the whole amount of an incumbrance, stated to be due at the time of the sale of his equitable interest in property surrendered by him, the creditors in the execution are necessary parties. *Tiffany v. Kent et als*, 2 Grat. 231.

11. In an action by partners, the suit is brought in the partnership name, without stating the names of the partners; but no objection is taken to the mode of naming the plaintiffs in the pleadings. This is no ground for defeating the action on the trial of the cause. *Downer & Co. v. Morrison*, 2 Grat. 250.

12. To a bill filed to subject the real assets in the hands of the heirs to satisfy a debt of the ancestor, the administrator of the ancestor is a necessary party. *Beall's adm'r v. Taylor's adm'r et als*, 2 Grat. 532.

13. A plaintiff in a foreign attachment having obtained a decree against a home defendant for the amount of a bond in his possession, the property of the absent debtor, and the obligor in the bond having been sued upon it by a third person comes into equity to enjoin the judgment on the ground of equities he has against it, the plaintiff in the attachment is a necessary party. *Jameson's adm'r v. Deshields*, 3 Grat. 4.

14. A bill should not be dismissed for defect of parties, if plaintiff has shown he has a right to relief on the merits. If the proper parties are not made by the bill, even in the appellate court, where the decree of the court below is reversed for want of parties, the case should be sent back to enable the plaintiff to make proper parties. *Ibid*.

15. On a bill to set aside a patent on the ground that it was obtained with a knowledge of a prior entry, the patentee or his representative must be before the court. *Hagan &c. v. Wardens*, 3 Grat. 315.

16. If the patentee is assignee of the person who made the second entry with knowledge of the first, then both or their representatives are necessary parties. *Ibid*.

17. A slave claiming a right to freedom is not a necessary party in a controversy between third persons, though his right to freedom may be involved in the controversy. *McCandlish, adm'r &c. v. Edloe et als*.

18. A grantor in a deed intended for the benefit of a married woman may maintain a suit to set it aside and have the trusts corrected, on the ground that it was not prepared according to the directions of the grantor, and does not effect her intentions. *Shepherd v. Henderson et als*, 3 Grat. 367.

19. A motion to quash a writ and inquisition founded on a judgment must be made in the name of a party on the record, and must be made against such a party. *Wallup's adm'r v. Scarburgh et als*, 5 Grat. 1.

20. All the persons secured by a deed of trust, either directly or indirectly, who are named in it, are necessary parties to a bill assailing the trust deed as fraudulent as to some of the *cestui's que trust*, and seeking a distribution of the trust fund. *Billups v. Sears et als*, 5 Grat. 31.

21. In a suit brought by the trustee of a married woman to assert and defend her rights, in which a full opportunity is afforded the *cestui que trust* for defending her rights, it is not necessary that she should be made a party. *Wardson, trustee v. Perkins*, 5 Grat. 345.

22. One of two administrators having taken no active part in the administration and having died, his administrator is not a necessary party to a bill filed by a distributee of the intestate for an administration account. *Will's adm'r v. Dunn's adm'r*, 5 Grat. 384.

23. The widow of the intestate having received her third of the estate and died, her administrator is not a necessary party to a suit by the only child of the intestate, to recover his proportion of the estate from the administrator. *Ibid.*

24. Legatees having been in possession of slaves for nearly five years, may file a bill to enjoin the sale of them under execution against a third person, without making the executor a party, though it does not appear he ever assented to the legacy. *Kelly v. Scott*, 5 Grat. 479.

25. To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and *cestui's que trust* in the deeds, the sheriffs of the counties in which the lands lie, and the execution creditors interested in the property should be parties. *Clough v. Thompson*, 7 Grat. 26.

26. In a suit by residuary legatees against the executor for a distribution of the estate, the specific legatees should be made parties, unless it appear that their legacies have been paid. *Nelson's ex'or v. Page et als*, 7 Grat. 160.

27. All the sureties of an executrix should be made parties to a suit by legatees for distribution, or a sufficient excuse should be shown for failing to make them parties, before a decree is made against one of them. *Hutcherson &c. v. Pigg*, 8 Grat. 220.

28. In a creditor's suit, either by foreign attachment, or to marshal assets against heirs residing abroad, the lands descended having been sold under a decree at the suit of the heirs and the proceeds being in the hands of a commissioner, he should be a party as such; and his being a party as administrator of the deceased debtor is not enough. *Carrington et als v. Didier, Norvell & Co.*

29. In a bill persons claiming to be legatees or assignees of legatees against defendant's legatees, or assignees of legatees, under the same will, for distribution of the slaves bequeathed to the legatees jointly, the pre-

sumption is in the absence of all proofs and pleadings to the contrary, that the persons made parties to the suit as legatees are not fictitious persons, or mere pretenders to the characters assumed in the proceedings. *Ball et als v. Johnson's ex'or et als*, 8 Grat. 281.

30. In such case, the cause being a proper one upon its merits for distribution of the subject amongst those entitled thereto, the bill should not be dismissed for want of parties or of proof that the parties were what they professed to be, but the court should direct the plaintiff to amend the bill and make the proper parties. *Ibid.*

31. A personal representative of a deceased insolvent co-obligor is not a necessary party to a suit in equity by the executrix of the obligee against the administratrix of one of the obligors, to enforce payment of the bond, so as to require the plaintiff to have one appointed and make him a party. *Montague's ex'x v. Turpin's adm'x*, 8 Grat. 453.

32. L. buys land of D. & T. and gives to each his bonds for his share of the purchase money. The contract is afterwards rescinded, but before this is done, D. assigns one of the bonds. On a bill to enjoin a judgment recovered on this bond by the assignee, T. is not a necessary party. *Drake v. Lyons*, 9 Grat. 54.

33. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties. *Sillings et als v. Bumgardner, guardian*, 9 Grat. 273.

34. A bill is filed to subject lands to the satisfaction of a judgment, after the death of the debtor, and charges fraud in certain conveyances from the debtor to his son. The son having conveyed some of the lands to third parties, all such persons must be made parties. *Henderson v. Henderson's ex'x*, 9 Grat. 394.

35. In a bill by a surety whose principal is dead, to compel his executor to pay his debt, the creditor is a necessary party. *Stephenson v. Taverners*, 9 Grat. 398.

36. A bill to marshal assets and for administration should be in behalf of all the creditors and the heirs and devisees should be parties. *Ibid.*

37. The administrator is the proper party to revive a proceeding against the Upper Appomattox Co. to recover damages for injuries sustained to land, the jury having assessed the damages and returned their report to the court. *Upper Appomattox Co. v. Hardings*, 11 Grat. 1.

38. To a bill for dower, by widow, in land conveyed by husband in his life-time, without wife's relinquishment, the present owner is the only necessary defendant. *M. Blair v. Thompson et als*, 11 Grat. 441.



39. Landlord who has made a contract for the sale of land, in the possession of his tenant, is the proper party to recover possession, if the tenant refuses to surrender it. *Harrison v. Middleton*, 11 Grat. 441.

SEE CO-DEFENDANTS.

---

## PARTITION.

1. A tenant by courtesy of lands, purchases the reversionary interest of one of the heirs. Another interest is held by infants. A court of equity will decree a partition of the land at the suit of the tenant by the courtesy. *Otley v. McAlpine's heirs*, 2 Grat. 34.

2. A partition of land is made which has been acquiesced in for many years, but which is afterwards set aside. Held: 1st. Allowance shall be made for permanent improvements, so far as they add to the present value of the estate. 2d. In accounts for rents and profits, the estimate shall be upon the value at the time of the partition. *Chinn et als v. Murray et als*, 4 Grat. 348.

3. A brother and sister both of whom are married, own a tract of land jointly. In 1802, the brother and his wife and the sister and her husband unite in a deed of partition of the land and from thence to the present time the land is held in severalty by the parties respectively and those claiming under them. The partition is valid and binding on the parties, though no certificate of the privy examination of the wives is annexed to the deed. *Bryan v. Stump, &c.*, 8 Grat. 241.

4. In a bill for partition, where both parties claim under the same person, it is sufficient to prove the derivation from him, without proving his title. *Hannon et als v. Hannah*, 9 Grat. 146.

5. Upon a bill for partition of land, if the title of the plaintiffs is doubtful, the court prior to the act, Code, ch. 124, § 1, p. 526, should have sent the parties to law to try their title. *Currin et als v. Sprauell et als*, 10 Grat. 145.

6. By the act, Code, ch. 124, § 1, p. 526, a court of equity may decide upon the title in suits for partition, and this, though the suit was commenced before the statute was enacted; and after allowing a reasonable time to the parties for trial, should proceed to try the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts, either by a jury or otherwise, as may be most proper. *Ibid.*

---

## PARTNERS.

1. The property of a partnership is not liable to the individual debts of

a partner until all the debts of the partnership are paid, including debts due from the partnership to either of the partners. *Christian v. Ellis et als*, 1 Grat. 396.

2. One partner in a farming partnership executes his bond for the rent agreed to be paid. This is paid afterwards out of the partnership effects. Creditors of the partnership have no right to be substituted to the obligee in the bond, for the satisfaction of their debts. *Ibid.*

3. Partners make a note, and then the partnership is dissolved. The partner who is authorized to settle up the business of the partnership, cannot renew the note in the partnership name, so as to bind the other partner. *Parker v. Cousins*, 2 Grat. 372.

4. In such case, though the last note does not bind the partner who did not execute it, the first note is still a valid security against him, though it was surrendered when the last note was taken. *Ibid.*

5. The renewed note being made in the partnership name, it cannot be inferred that the partnership creditor intended to release the partner who did not execute it, and look alone to the partner who renewed the note. *Ibid.*

6. In an action brought by partners, the suit is brought in the partnership name, without stating the names of the partners; but no objection is taken to the mode of naming the plaintiffs in the pleadings. This is no ground for defeating the action on the trial of the cause. *Downer & Co. v. Morrison*, 2 Grat. 250.

7. What constitutes proof of dissolution of partnership. *Perkins v. Perkins' ex'ors*, 3 Grat. 364.

8. The act of February 5th, 1828, Sup. Rev. Code, 265, dispensing with proof of handwriting in certain cases, applies to instruments signed with the name of a partnership, but the question is still open, whether the persons sought to be charged are members of the firm. *Shepherd, Hunter & Co. v. Frys*, 3 Grat. 442.

9. The act, March 19th, 1839, ch. 66, § 4, p. 43, only applies to actions brought by a partnership and dispenses with proof of the component members of the firm, as described in the declaration, unless denied by plea, to be verified by affidavit. *Ibid.*

10. Under the circumstances a surviving partner was not allowed compensation for carrying on the business after the death of his partner, or for settling up the business of the concern. *Patton's ex'ors v. Calhoun's ex'ors*, 4 Grat. 138.

11. QUÆRE: If generally the surviving partner is entitled to compensation for settling up the business of the concern? *Ibid.*

12. *QUÆRE*: If a joint or partnership creditor is entitled to share in the separate estate of his deceased debtor with the separate creditors of the debtor? *T. Morris' adm'r v. S. Morris' adm'r et als*, 4 Grat. 293.

13. The debtor partner having by his will subjected his real estate to the payment of his debts, the partnership creditor is entitled to share with the separate creditors in that fund. *Ibid.*

14. Two partners having given their joint and several bond for a partnership debt, the creditor is entitled to share the separate estate of the deceased partner with the separate creditors. *Ibid.*

15. The articles of co-partnership covenant that each partner shall put \$1,000 into the concern, but the deceased partner failed to do it; the firm having lost, and the surviving partner having paid the debts of the concern, he is a creditor by specialty of the deceased partner, and entitled as such to share in the separate estate. *Ibid.*

16. The provision in the articles of partnership that each partner shall share the profits and losses equally, is not a covenant which will entitle the surviving partner to claim as a specialty creditor the losses he has been compelled to pay. *Ibid.*

17. The surviving partner being the administrator of the deceased partner is entitled to retain, out of the separate estate in his hands, against separate debts of no higher dignity, for all debts for which he is entitled to share the separate estate with the separate creditors. *Ibid.*

18. One partner, in the absence of, and without authority from, his co-partner, sells partnership property and executes a bill of sale under seal, in the name of both, to the purchaser. The sale is made to pay a pressing debt of the absent partner, is *bona fide*, and for full value; and the money is applied to the debt. The sale is obligatory upon and passed the title of the firm. *Forkner v. Stuart &c.*, 6 Grat. 197.

19. If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it; and if it is made by them in their own name, and not in the name of the firm, an action may be maintained thereon by one against the other, during the continuance of the partnership. *Wright v. Michie*, 6 Grat. 354.

20. A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or re-imbursement. *Watson v. Fletcher*, 7 Grat. 1.

21. Although the pleadings do not shew the nature of the partnership, yet if this appears from the evidence before the commissioner directed to

settle the accounts, the court should re-commit them, and direct an enquiry into the consideration on which the claims of the parties are founded. *Ibid.*

22. One of the partners qualifies as administrator of the other; he cannot question the title of his intestate to one moiety of the personal property bought and used for the partnership purposes. *Ibid.*

23. The whole, and not a moiety, of the personal property belonging to the partnership must be sold, and the proceeds divided between the living partner and the estate of the deceased partner. *Ibid.*

24. The surviving partner, administrator, files a bill to set aside conveyances made by his intestate, and to have his claims upon the estate adjusted: and he then advertises for sale his intestate's undivided moiety of the real estate held by them jointly. HELD: By his bill he placed his whole trust and authority under the control of the court; and it was an abuse of his fiduciary relation to proceed to sell the real estate before an adjudication of the matters in controversy; and the sale was properly restrained by injunction. *Ibid.*

25. Under the circumstances of the case, and after the time which had elapsed, the court refused to enquire into errors which were alleged to appear upon the face of a final settlement of a partnership between the former partners. *Ross' ex'or v. McLanahan's adm'r et als.* 7 Grat. 86. *Same v. Haden's adm'r.* *Id.*

26. In a suit by the executor of one partner against the executor and sureties of the other partner, under the circumstances, the sureties were not allowed to set up a credit which had been set up by the partner, and again by the executor, and had been disallowed by the court in both instances. *Ibid.*

27. A partner in two firms, one of which is debtor to the other, after the dissolution, was authorized, under the circumstances, to transfer the debt due from the one firm to the other to a creditor of the latter firm. *Peyton et als v. Stratton et als,* 7 Grat. 380.

28. A partnership for the manufacture of iron is composed of four persons, the names of two of whom do not appear, and they live at a distance. The acting partners buy land in their own name, for the purpose of obtaining from it wood to be used in the manufacture of iron; and so far as it is paid for, it is paid for out of the partnership effects. The land is partnership property; and the partnership having failed, the two dormant partners are liable to the vendor for the balance of the purchase money. *Brooks v. Washington,* 8 Grat. 248.

29. One partner having a knowledge of the debts of the partnership, of which the other is ignorant, and selling out to his partner, is bound to the utmost good faith on his part. He is bound not only to disclose truly any

information in his possession that may be called for, but if he perceives that the purchasing partner is laboring under incorrect views in reference to the amount of debt due by the concern, by which he may be misled into a too high offer for the interest to be sold, it is his duty to furnish all the data he may have, by which such views may be corrected, and the mischief prevented. *Sexton v. Sexton*, 9 Grat. 204.

30. Whether a bond, and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties in giving and taking them; and this intention may be ascertained from the attendant circumstances. *Niday v. Harvey & Co. et als*, 9 Grat. 454.

31. In debt on a note signed with the partnership name, the declaration charges that the defendants by their partnership name subscribed the note and there was no affidavit by the defendants or any one of them putting the execution of the note in issue. They are precluded from showing that the partnership had been dissolved before the note was made and that the person making it had no authority to execute it for the partners. *Phaup &c. v. Stratton*, 9 Grat. 615.

---

## PATENTS.

1. The elder patent of the Commonwealth confers seisin of the land embraced therein, though at the time of its emanation, there was actual occupation of the land by another person. *Overton's heirs v. Davisson*, 1 Grat. 211.

2. A mistake in a patent calling for an object where it is not found does not affect its validity. *Ibid.*

3. The beginning corner of a survey or of several dependent surveys being fixed; in the absence of proof of any other corners or boundaries, or of any calls for natural objects conflicting with the calls for courses and distances in the patents issued on such surveys, the identity of the land embraced therein is to be ascertained by the courses and distances of the patents, beginning at the fixed corner. *Ibid.*

4. A court of equity will not entertain a bill to repeal a patent, after ten years. *Goodwin v. McCluer*, 3 Grat. 291.

5. A court of equity has jurisdiction to set aside a patent obtained with knowledge of a prior entry. *Hagan et als v. Wardens*, 3 Grat. 315.

6. On a bill to set aside a patent on the ground that it was obtained with a knowledge of a prior entry, the patentee or his representative must be before the court. *Ibid.*

7. If the patentee is the assignee of the person who made the second entry with knowledge of the first, then both, or their representatives, are necessary parties. *Ibid.*

8. A party having obtained a patent for land with knowledge of a prior equitable title in another, and having brought a writ of right for the land, a court of equity will award an injunction to stay proceedings for a reasonable time to afford the tenant an opportunity to get in the legal title, outstanding in a third person. *Goodwin v. McCluer*, 3 Grat. 291.

9. Land having been granted by the Commonwealth, and a party claiming under a junior patent, not showing a forfeiture of the land or transfer of the forfeited title to him, the land was not waste and unappropriated and nothing passed by his junior grant. And as the junior patent issued after the commencement of the suit, there could be no adverse possession under it. *Hannon v. Hammah et als*, 9 Grat. 146.

## PAYMENTS.

1. Where the Treasurer of the State has received money and made disbursements on account of a particular fund in the same year, the disbursements are to be applied as credits on the receipts of that year. *Wilson et als v. Burfoot, Treasurer*, 2 Grat. 134.

2. Where he has made disbursements in a year in which he has received nothing, in the absence of instructions from him, the disbursements will be applied as credits to the money first received. *Ibid.*

3. An obligor in a bond is sued thereon by a party who claims under a forged assignment and judgment is recovered. The obligor having having notice of the forgery, and of the right of another to the bond, is not protected from the claim of the rightful owner, though he makes payment under execution. *Jameson's adm'x v. Deshields*, 3 Grat. 4.

4. A third person having obtained a decree against a vendee of land for a sum of money to be paid out of the purchase money due the vendor, and the vendee having compromised that claim for less than the amount thereof, he is only entitled to credit upon the purchase money for the sum actually paid. *Bryan v. Salyards et als*, 3 Grat. 188.

5. A payment made by a debtor to his creditor cannot be applied by the creditor to a debt arising subsequently, without the assent of the debtor. *Laws' ex'ors v. Sutherland et als*, 5 Grat. 357.

6. A debtor by four bonds payable at successive periods, makes payments which, upon a settlement after the death of the debtor, are ascertained to amount to more than the first bond. The creditor will not be

allowed to apply the surplus to the fourth bond; but the court will apply it to the second bond in relief of a party bound as surety for that bond. *Ross' ex'or v. M'Lauchlan's adm'r et als*, 7 Grat. 86. *Same v. Haden's adm'r. Id.*

7. A creditor by two judgments and a bond files a bill against the executor of the debtor, and obtains a personal decree against the executor for the whole amount. Upon an execution which issued upon this decree a part of the money is made. The judgments being debts of highest dignity, the money so made is to be applied as a payment upon them in relief of a party who is bound as surety for the judgments. *Ibid.*

8. In this case the executor sells lands of his testator, and pays the proceeds to the creditor. As the judgments were liens upon the lands, the payment is to be applied as a credit upon the judgments. *Ibid.*

9. Eleven bonds are given for the purchase money of two-thirds of a tract of land, payable at successive periods, and a deed of trust is given to secure them. The obligee assigns the 5th, 6th, and 7th of these bonds. There having been a prior incumbrance on the whole tract, the assignee is entitled both against the obligee and an attaching creditor subsequent to the assignment, to have the one-third not covered by the last deed of trust applied to pay the first incumbrance. *Schofield v. Cox et als*, 8 Grat. 533.

10. The obligors having paid off the two first bonds, and having paid on account both before and after the assignment, but without notice of it, more than enough to discharge the 3d and 4th bonds, though they might be entitled to insist that the amount after paying these should be applied to the 5th bond, yet neither the obligee nor his attaching creditor is so entitled: And in the first case the assignee would be entitled, on the principle of marshalling assets, to be substituted on the other bonds not assigned, as against the obligee and attaching creditor. *Ibid.*

11. All the land being sold together, the one-third, and so much of the two-thirds of the purchase money as is necessary, will be applied to discharge the first incumbrance, and the balance will be applied to pay the assignee. *Ibid.*

12. A bond is given for a loan of money which is to be paid in a few days by a debtor of the obligor. The debtor pays the debt and takes up the bond. It is thereby extinguished; and if in a future settlement between the borrower and his debtor this claim is omitted by mistake, the remedy of the debtor is not on the bond, but for money paid to the use of the borrower. *Young for &c. v. Johnston*, 10 Grat. 269.

13. In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate, though payments and set-offs cannot be proved, without an account of such payments and set-offs filed, yet the defendant

may prove that the money sued for or any part of it, was not lent or advanced for the intestate, but was paid out of the money of the intestate in the hands of the plaintiff. *Johnson's ex'x v. Jennings adm'r*, 10 Grat. 1.

14. A widow having received from the executors of her husband bonds of a third person, in part satisfaction of the amount due to her under a marriage agreement, and having given to them a receipt for the amount of the bonds, it is a valid payment to her to that extent. *Findley's ex'or v. Findley*, 11 Grat. 434.

SEE APPLICATION OF PAYMENTS.

---

## PENALTIES.

SEE FORFEITURES AND PENALTIES.

---

## PERJURY.

1. Indictments for perjury must be according to the common law. *Lodge's case*,\* 2 Grat. 579.

2. An indictment for perjury in swearing falsely to an answer in chancery, should set out the whole bill and answer. *Ibid*.\*

3. The swearing falsely before a person not authorized to administer the oath is not perjury. *Matthew Williamson's case*.

4. The swearing falsely before a clerk that a person applying for a marriage license is over twenty-one years of age is not perjury. *Ibid*. \*

5. Perjury may be committed in taking an oath before a justice, on a trial of a warrant for debt, that the defendant did not sign the order on which the warrant issued. *Litton's case*, 6 Grat. 691.

6. Upon an indictment for perjury where it is a question whether the oath taken is legal perjury, the court should not quash the indictment but should put the defendant to his demurrer. *Ibid*.

7. An indictment for perjury must shew that the evidence which the defendant gave was material; and therefore if the evidence which the defendant gave before the grand jury is not shewn clearly on the face of the indictment to relate to an offence committed within the county, the indictment is defective. *Pickering's case*. 8 Grat. 628.

\* See Code of Va., ch. 207, § 5, p. 769.



- |                               |  |                          |
|-------------------------------|--|--------------------------|
| 1. Official bond.             |  | 4. Co-executors.         |
| 2. Rights and liabilities of. |  | 5. Suits by and against. |
| 3. Accounts of.               |  |                          |

## OFFICIAL BOND.

1. The act, 1 Rev. Code, ch. 104, § 63, p. 390, authorizes an action on the executorial bond, against an executor and his sureties by creditors by decree, as well as creditors by judgment. *Bush v. Beale*, 1 Grat. 229.

2. A decree against an executor *de bonis testatoris*, on which an execution has been returned *nulla bona*, authorizes a suit on the executors bond. *Ibid.*

3. Co-executors joining in the same official bond are sureties for each other. *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 113.

4. The sureties of an executor who qualified prior to the act of Feb. 16th, 1825, Sup. Rev. Code, ch. 158, p. 215, are not responsible for the proceeds of real estate wasted by him. *Ibid.*

5. An administration bond not conforming to the requisitions of the statute and containing no provisions for the benefit of creditors, the sureties therein are not liable to creditors. *Roberts v. Colvin*, 3 Grat. 358.

6. Decree against administrator, and action on administration bond against sureties, and judgment. The sufficiency of assets is fixed by the judgment as to the sureties, though the personal decree against the administrator is reversed. *Mill's adm'r v. Dunn's adm'r*, 5 Grat. 384.

7. The official bond of an executor contains in the penal part, the names of the executor and several sureties, and there is no blank for the name of another, but it is signed and sealed by all those whose names are in the penal part, and also by another person. It is the bond of all, including the last mentioned person. *Luster v. Middlecoff et als*, 8 Grat. 54.

8. The official bond of an executrix only binding the obligors for the due administration of the personal assets, the sureties are to no extent responsible for the rents and profits of the real estate. *Hutcherson, &c. v. Pigg*, 8 Grat. 220.

---

RIGHTS AND LIABILITIES OF.

1. An executor who is the residuary legatee, is bound to pay interest on legacies, though not demanded for fourteen years. *Bourne's ex'or v. Meham*, 1 Grat. 292.

2. An executor claiming no interest as devisee or legatee under the will, and not being liable for costs, is a competent witness to sustain the valid-

ity of the will under which he acts. *Coalter's ex'or et als v. Bryan and wife et als*, 1 Grat. 18.

3. A purchase of property by an executor at his own sale may be avoided by the parties interested therein. *Bailey's adm'x v. Robinsons*, 1 Grat. 4.

4. A purchase of property by an executor at his own sale thereof, being set aside, he will not be held to take it at what it was then worth, upon the estimate of witnesses, but it will be sold again, if more can be obtained for it, and if this cannot be done, his purchase will be confirmed. *Ibid.*

5. Executors pursuing such a course in the administration of their testator's estate as a judicious man, looking alone to his own interests, would, under the circumstances pursue in his own affairs, will be held justified in so doing. *Kee's ex'or v. Kee's creditors*, 2 Grat. 116.

6. Executors held justifiable under the circumstances, in paying bonds of their testator, discounted by an unchartered institution for his benefit. *Ibid.*

7. Executors held justified in making a compromise with a person having assets of the estate in his hands, for the purpose of getting possession thereof. *Ibid.*

8. Until a contingent legacy is payable, an executor cannot relieve himself and his sureties from responsibility for it by paying it over to the guardian of the legatee. *Swope v. Chambers*, 2 Grat. 319.

9. An executor cannot elect to hold a legacy as guardian of the legatee, until it is payable. *Ibid.*

10. An executor being also guardian, there must be some act or declaration by which to indicate that he holds a legacy as guardian. *Ibid.*

11. An executor assents to a sale of slaves under execution at a place other than the courthouse, and they sell at a sacrifice; but the sale is fairly made. The executor is not liable. *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 113.

12. An executor of an executor pays a debt of the first testator, for which judgment had been recovered against his testator. He then settles his testator's administration account before the court of probat, by which his testator is made a creditor of the estate. He then sues the other executors of the first testator for the amount of the judgment he had paid, and recovers judgment, which is satisfied out of their testator's estate. Afterwards, upon a settlement of the deceased executor's account before the chancery court, it appears he was a debtor instead of a creditor. There being no fraud or collusion on the part of the surviving executors with the executor of the deceased executor, they are not responsible. *Ibid.*

13. An appeal as of right lies from the county to the superior court,

from an order revoking absolutely or conditionally the power of an executor or administrator, with a view to the appointment in his stead of an administrator *de bonis non*, or to the committing of the estate to the sheriff. *Atkinson v. Christian*, 3 Grat. 448.

14. An administratrix who sells the property of the estate at a very great sacrifice, and buys it herself, will be held to account for it at the appraised value. *Cross' curatrix v. Cross' legatees*, 4 Grat. 257.

15. An administratrix who hires out the slaves publicly, and hires them herself at very reduced prices, and then hires them out at advanced prices, will be held to account for them at the advanced price; or, if that cannot be ascertained, for reasonable hires. *Ibid.*

16. An administratrix, or other fiduciary, whose duty it is to hire out slaves for the benefit of *cestuis que trust*, will be held to account for interest on their estimated hires. *Ibid.*

17. An executor or administrator, with the will annexed, may appeal without giving security, where the object of the appeal is to assert the rights or protect the interests of the estate he represents. *McCauley's adm'r v. Griffin's ex'or*, 4 Grat. 9.

18. A surviving partner, being the administrator of a deceased partner, is entitled to retain out of the separate estate in his hands, against separate debts of no higher dignity, for all debts for which he is entitled to share the separate estate with the separate creditors. *T. Morris' adm'r v. S. Morris' adm'r et als.*, 4 Grat. 293.

19. An executor sells a slave belonging to his testator's estate, the sale not being necessary for the payment of debts, and he re-purchases the slave and thereafter holds him as his own. The slave is the property of the estate, and the executor shall account for his annual hires, with interest thereon, though he was not in fact hired out by the executor. *Rosser, ex'or of Wood, v. Depriest et als.*, 5 Grat. 6.

20. A sale by an administrator of his intestate's effects, though upon a credit, must be treated at law as a conversion thereof. *Clarke v. Wells' adm'r*, 6 Grat. 475.

21. But when upon a settlement of the administration of the administrator, between proper parties, it appears that the collection of such sale bonds, by his personal representative, is unnecessary for the re-imbursement or indemnity of his decedent's estate, they will be turned over to the administrator *de bonis non*, as unadministered assets. *Ibid.*

22. An administrator sells assets on a credit, and dies indebted to the estate. A purchaser qualifies as administrator *de bonis non*. The proceeds of sale not being necessary for the re-imbursement or indemnity of the first administrator, his administrator will be enjoined from collecting the debt

from the administrator *de bonis non*; who shall hold it as unadministered assets of his intestate. *Ibid.*

23. To the judgment of a county court refusing to permit a person named as executor in a will to qualify without giving security, an appeal, as of right, lies to the circuit court. *Fairfax v. Fairfax's ex'or*, 7 Grat. 36.

24. A testator appointed his wife and son executrix and executor of his will, and directed that they should not be required to give security. Some years afterwards he, by codicil to his will, appointed a son-in-law an executor with his wife and son. He is not entitled to qualify without giving security. *Ibid.*

25. QUÆRE: If in such case parol evidence is admissible to show the intention of the testator? *Ibid.*

26. An administrator who was the partner of the intestate, cannot question his title to a moiety of the partnership personal property, on the ground that it was bought and used for gambling purposes. *Watson v. Fletcher*, 7 Grat. 1.

27. When an administrator with the will annexed resorts to equity to establish and enforce claims against his testator's estate, and to set aside conveyances made by him, he places his whole trust and authority under the control of the court; and he will be restrained by injunction from proceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee and legatee. *Ibid.*

28. An administrator or executor is not bound to sue for the recovery of a debt due to estate, where it is apparent the debtor is not able to pay it. *Mitchell's adm'r v. Trotter and wife*, 7 Grat. 136.

29. Under the circumstances, an executor was held not to be responsible for a debt due the estate, and lost by the insolvency of the debtor, occurring after the testator's death. *Nelson's ex'or v. Page et als.*, 7 Grat. 160.

30. When there is no hand to receive a legacy, the executor should invest it in an interest-bearing fund, or should bring it into court to be so invested. *Lyon's adm'r v. Magagnos' adm'r*, 7 Grat. 377.

31. A sale of bonds of the estate by an executor, at a discount of eighteen per cent, when the circumstances of the estate do not require it, is a *devastavit*. *Pinckard v. Woods, &c.*, 8 Grat. 140.

32. A devise that executors shall sell land, confers a naked power; but when coupled with directions that the proceeds shall be equally divided between specified persons, it vests in the executors an interest and a trust, and it is their duty to take possession of the land and account for the rents and profits. *Mosby's adm'r et als. v. Mosby's adm'r*, 9 Grat. 584. *Miller v. Jones et als. Idem.*

33. Sheriff, administrator with the will annexed, may execute the power. *Ibid.*

34. Upon a sale of land by executors, immediately after the property is cried out, and before anything is done, the executors accept another person as purchaser, both being men of property and credit. They will not be liable if the latter fails before the purchase money is paid. *Elliott v. Carter et als.*, 9 Grat. 541.

35. For the principles upon which the responsibility of executors will be adjudged. See *Ibid.*

36. The testator gives certain property to his wife for life, and directs that at her death his executors shall sell it and divide it among his children. After the widow's death, the executor sells the property. His sureties are liable for his *devastavit*. *Almond and wife v. Mason's adm'r et als.*, 9 Grat. 700.

37. When the condition of the estate does not require a sale of the slaves, and they are divided among the legatees or distributees, the executor is not entitled to a commission on their appraised value. *Claycomb's legatees v. Claycomb's ex'or*, 10 Grat. 589.

38. But where grain or other perishable property, which by the law the executor is directed to sell, is divided in kind among the legatees, the executor is entitled to a commission upon the appraised value. *Ibid.*

39. Executors or administrators with the will annexed, who are legatees of slaves under the will, agree upon a division of the slaves, and each takes possession of those allotted to him. This is an assent to the legacy by the executors or administrators. *Frazer's adm'r v. Bevill et als.*, 11 Grat. 9.

40. The legacy to one is for life, with the remainder over upon his dying without issue. The assent to the legacy in favor of the first taker, is an assent in favor of the contingent legatee over. *Ibid.*

41. Though an executor assents to a specific legacy, he does not thereby dispense with a refunding bond. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

42. An executor, though he has authority to submit a matter to arbitration, yet is responsible as for a *devastavit*, if by the award his testator's estate is injured. *Ibid.*

43. An executor making an improvident submission to award, as to a part of his testator's estate which has been specifically bequeathed, and the result of the submission being, that the property is left in his hands as his own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property. *Ibid.*

44. An administrator in Mississippi, having purchased for the estate land

sold for the payment of a debt due to the estate, held, under the circumstances, not bound to keep the land and account for the price; but the land is to be treated as the property of the estate. *Powell v. Stratton et als.*, 11 Grat. 792.

45. Under the circumstances, the administrator is not held responsible for money which became worthless in his hands by the insolvency of the bank. *Ibid.*

---

### ACCOUNTS OF.

1. An administrator dying before the passage of the act of 16th February, 1825, in relation to his commissions, will not be deprived of his commissions. *Turners v. Turners' adm'r*, 1 Grat. 11.

2. An administrator who qualified before the passage of the act and lived for two years after its passage, without settling his accounts, is not entitled to his commissions. *Ibid.*

3. An administrator of an intestate who lived and died in another State, answers that he has no assets in his hands; and knows of none that can come to his hands. The Court of Appeals will not reverse a decree against the distributees, because no account of this administration was taken. *Hairston v. Medley*, 1 Grat. 96.

4. The whole profits of infants' estates being necessary for their support, the interest on the annual balances of the administration account; the hires of slaves, and other annual profits in the hands of the administrator, should not be involved in that account; but should go into the account between the administrator and guardian. *Jackson's adm'r v. Jackson's heirs*, 1 Grat. 143.

5. Administrator entitled in his account to credit for moneys expended in permanent improvements upon the real estate of the heirs. *Ibid.*

6. How administrator will be credited for amount of purchases made at his stores by widow. *Ibid.*

7. An executor having the management of both real and personal estate, and making disbursements in the administration of the estate, and also for the support of the family; in the settlement of his accounts, he is entitled to be credited in his administration account, with his disbursements as executor, and in his account of the real estate with his disbursements for the family. *Hobson v. Yancey et als.*, 2 Grat. 73.

8. Executors not keeping their accounts properly, this is not, of itself, sufficient to deprive them of their commissions, but they are to be held to a rigid accountability. *Kee's ex'or v. Kee's creditors*, 2 Grat. 116.

9. An executor having died within two years after the passage of the act of February 16th, 1825, his estate is not to be deprived of commissions, though his accounts are not settled within two years. *Boyd's ex'or v. Boyd's heirs*, 3 Grat. 113.

10. An executor living more than two years after the passage of said act and not settling his accounts, is not to be allowed commissions. *Ibid.*

11. This act does not apply to the proceeds of real estate sold by an executor. On that he is entitled to commissions, though he does not settle his accounts. *Ibid.*

12. The administration account should not be closed before the time when all the debts of the estate are paid. *Ibid.*

13. An administrator not having settled his accounts will not be allowed commissions. *T. Morris' adm'r v. S. Morris' adm'r et als.*, 4 Grat. 293.

14. In a suit by an administrator *de bonis non*, against the administrator of the first administrator, for a settlement of the first administrator's account, it is irregular to decree payment to the administrator *de bonis non*; but the distributees being parties and not objecting, the decree will protect the defendant, and therefore the error is no ground of reversal of the decree in the appellate court. *Ibid.*

15. At the close of an administration account, the interest is not to bear interest. *Ibid.*

16. An executor takes bonds for purchases made at a sale by himself of testator's personal estate, and it does not appear when these bonds were paid off. He will be charged with the principal of the bonds in the year when they fell due, but with interest only from the end of the year. *Rosser, ex'or of Wood v. Depriest et als.*, 5 Grat. 6.

17. An administrator whose administration terminated before 1797, is to be charged but five per cent interest upon the balance of principal found against him upon a settlement. *Wills' adm'r v. Dynn's adm'r*, 5 Grat. 384.

18. The error appearing upon the face of the commissioner's report, which is the basis of the decree, and not being susceptible of being repelled by extrinsic evidence, it will be corrected in the appellate court, though not excepted to in the court below. *Ibid.*

19. An administrator having failed to render an account of crops, rents, and hires which came to his hands, proof of the estimated net annual value may be resorted to for the purpose of charging him. *Ibid.*

20. Partial payments made by an executor to legatees from time to time, though they amount to more than the shares of some of the legatees, does not constitute such a settlement of the executor's account as to take the de-

mand for commissions out of the operation of the statute. *Nelson's ex'or v. Page et als.*, 7 Grat. 160.

21. Land in which a widow is entitled to dower, being sold by the executor under a charge for payment of debts, he should be credited in his account of the proceeds, for the amount he has paid the widow for her dower interest. *Meeks' adm'r, &c. v. Thompson et als.*, 8 Grat. 134.

22. A case in which, under the circumstances, an administrator was not charged with interest on a balance in his hands, from 1826, when his account was settled, until 1846, when the family ceased to live together; and was charged with interest from the last date on the whole balance, principal and interest. *Peale v. Hickie and others*, 9 Grat. 437.

---

### CO-EXECUTORS.

1. Executors selling land devised by the will to be sold, sell as trustees; and as such are only liable for their respective receipts, unless guilty of fraud or gross neglect amounting to fraud. *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 113.

2. For the failure of the executor receiving the proceeds of real estate, to apply them to the payment of the debts of the estate, whereby slaves specifically bequeathed are taken in execution and sold, the other executors are not responsible. *Ibid.*

3. Where one of two executors performs all the labor of the administration, he may be allowed all the compensation, and it is not for the legatees to object to this. *Claycomb's legatees v. Claycomb's ex'or*, 10 Grat. 589.

---

### SUITS BY AND AGAINST.

1. A person acting as executor is not to be made a party personally, to a bill filed to contest the validity of the will under which he is acting. *Coalter's ex'or et als. v. Bryan and wife et als.*, 1 Grat. 18.

2. The act 1 Rev. Code, ch. 104, § 63, p. 390, authorizes an action on the executorial bond against an executor and his sureties, by creditors by decree, as well as creditors by judgment. *Bush v. Beale*, 1 Grat. 229.

3. A decree against an executor *de bonis testatoris*, in which an execution has been returned "no effects," authorizes a suit on the executorial bonds. *Ibid.*

4. It is error to make a personal decree against an administrator, without an account or admission of assets in his hands sufficient to satisfy the decree. *Wills' adm'r v. Dunn's adm'r*, 5 Grat. 384.



5. One of two administrators having taken no active part in the administration, and being dead, his administrator is not a necessary party to a bill filed by the distributee of the intestate for an account of the administration of the estate. *Ibid.*

6. In a suit by residuary legatees against the executor for a distribution of the estate, the specific legatees should be parties, unless it satisfactorily appears that their legacies have been satisfied. *Nelson's ex'or v. Page et als.*, 7. Grat. 160.

7. In a suit by legatees against the administrator *de bonis non*, of the heir of the executor of the testator, under the circumstances a decree against the administrator *de bonis non*, conclusively establishes against the heir and all his representatives, the indebtedness of the executor's estate to the legatees of his testator, that they had a right to follow the assets in the hands of the heir, that a sufficiency of such assets came to his hands, and that his representatives who had received his assets are accountable to said legatees for the assets so received. *Sheldon et als. v. Armstead's adm'r et als.*, 7 Grat. 264.

8. Under the circumstances, the decree against the administrator *de bonis non* of the heir, was held conclusive against the prior executor of the heir, upon the question of the indebtedness of the executor of the testator to his estate, the right to follow his assets in the hands of the heir, the receipt of sufficient assets by the heir for the payment thereof, and the liability of his estate for the amount. *Ibid.*

9. QUÆRE: What would be the effect generally of a judgment against an administrator *de bonis non* in establishing a debt against the estate, so as to conclude a former executor or administrator, and thereby subject him to a *devastavit*. *Ibid.*

10. The prior executor having paid over the assets to the legatees of the heir, with full notice of the claim of the legatees of the first testator, and after suit revived against him, such payment constituted a *devastavit*. *Ibid.*

11. A part of the assets of the heir's estate having been retained by the prior executor, and recovered by suit from his executor, by the administrator *de bonis non* of the heir, the prior executor is to be credited for the amount so recovered. *Ibid.*

12. Legatees having obtained a decree ascertaining the rights of all, on another bill to enforce the decree, they seeking satisfaction out of a common fund, it is proper for all of them to unite in one suit to get the benefit of the former decree in their favor. And the bill is not multifarious. *Ibid.*

13. If the first decree was in favor of all, and on appeal this decree was affirmed, though the decree in the court below, for some cause, omits to de-

cree in favor of one legatee, he may unite with the others in a bill to enforce the first decree. *Ibid.*

14. The personal representative of the prior executor having paid over the assets to the legatees of the prior executor, without notice of the plaintiff's claim, it was proper to subject them in the first instance instead of the personal representative. *Ibid.*

15. The amount paid over by administrator of prior executor, to administrator *de bonis non* of heir should be a credit to the prior executor on the principal of the debt due from the heir to the testator, for which the prior executor is responsible. *Ibid.*

16. If some of the legatees abandon their claims, the liability of the defendant is diminished by the amount of their shares. *Ibid.*

17. Under the circumstances, the plaintiffs should proceed first against the legatees of the heir, and should only recover from the legatees of the prior executor, for so much as they cannot recover from the legatees of the heir. *Ibid.*

18. Husband of a legatee for life of the prior executor having no assets of his wife, who died before the decree, is not liable for the life estate which had then terminated. *Ibid.*

19. Decree against the administrator *de bonis non* appealed from and affirmed, as the plaintiffs had no right to proceed against the prior executor's estate, to have satisfaction of the decree until it was affirmed, the act of 1826 did not begin to run in favor of the prior executor's estate until then. *Ibid.*

20. As the decree of the court below in pursuance of the decree of the court of appeals, ascertained the right of the plaintiffs to proceed against the sureties of the administrator *de bonis non* of the heir, the statute of 1826 began to run from that time in favor of his sureties. *Ibid.*

21. An executor signs a note for a debt of his testator as executor; and there is an action thereon against him as executor, but the count is in the *debet* and *detinet*, and the breach is in the failure to pay. *QUÆRE*: If upon a judgment by default, it should be against him as executor or personally? *Snead v. Coleman and wife*, 7 Grat. 300.

22. If it is error to render a personal judgment, it is a clerical error to be corrected on motion to the court, and not by appeal. *Ibid.*

23. In an *assumpsit* by an administrator for a debt due his intestate in his life-time, the defendant cannot set off a debt due him for money paid as the surety of the intestate since his death. *Minor v. Minor's adm'r*, 8 Grat. 1.

24. The count in *assumpsit* by the administrator, is for money had and received, and the bill of particulars merely states an account in which the

defendant is debtor for money received, stating a sum certain. This will not admit proof of an admission by the defendant, that he had received from a third person a certain sum belonging to the intestate's estate. *Ibid.*

25. All the sureties of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shewn for failing to make them parties, before a decree is made against one of them. *Hutcher-son, &c., v. Pigg*, 8 Grat. 220.

26. A personal representative of a deceased insolvent co-obligor in a bond, is not a necessary party to a suit in equity, by the executrix of the obligee against the administratrix of one of the obligors. *Montague's ex'x v. Turpin's adm'r et als*, 8 Grat. 453.

27. Judgment against an administratrix upon the bond of her intestate, is conclusive of the validity of the debt against the administratrix. *Ibid.*

28. Where a defendant in detinue dies, and the action is revived against his administrator, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention by the intestate, and the costs incurred in prosecuting the action against his intestate. *Hunt's adm'r. v. Martin's adm'r*, 8 Grat. 578.

29. Where an action of detinue is revived against an administrator, and a judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administrator, to be levied of the goods of his intestate in his hands to be administered. *Ibid.*

30. In a suit for distribution, though there is a decree for the plaintiff, yet, if the administrator has been in no default, he shall have costs. *Eidson v. Fontaine, adm'r, &c., et als*, 9 Grat. 286.

31. Vendor retaining title, and vendee being insolvent, a court of equity will not enforce a contract between a subsequent purchaser and one of three executors of the vendor, for the release of the lien. *Stuart's ex'ors v. Abbott et al*, 9 Grat. 252.

32. A surety, whose principal is dead, may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt, so as to exonerate the surety from his responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring, for a settlement of the administration and account of the assets, whether legal or equitable; but the creditor must be a party, that he may receive the money when it is recovered. *Stevenson v. Taverners*, 9 Grat. 398.

33. A bill to marshall assets, or for their administration, should be on behalf of the plaintiff and all other creditors; and the heirs and devisees should be parties. But if the proper parties are not made, the bill should

not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account has been made in another suit having the same object. *Ibid.*

34. If several suits are pending by different creditors, the court will order the proceedings in all but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary. *Ibid.*

35. A creditor, who with the knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay costs. *Ibid.*

36. A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree. *Ibid.*

37. When several creditors' suits are pending, the decree may be made in the cause first ready for hearing, though that is not the first suit brought. *Ibid.*

38. In a suit by distributees against the administrator, the accounts having been referred, a report is returned before the defendant's evidence is filed. He excepts to the report and files an affidavit showing a sufficient excuse for not sooner taking his evidence, and asks for a recommitment of the report. Under these circumstances though the testimony may sustain the defendant as to the subject of the controversy, the bill should not be dismissed, but the plaintiff should have an opportunity to disprove the testimony, and is also entitled to have an account of administration. The report should be recommitted. *Thomas v. Dawson and wife*, 9 Grat. 551.

39. A mere error of form in an execution issued against an executor, where it has been treated throughout as an execution *de bonis testatoris*, cannot be set up as a defence to an action of *devastavit* against the executor and his sureties, founded upon the return upon it. *Beale's adm'r v. Botetourt Justices*, 10 Grat. 278.

40. A suit for an account of administration is brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his estate is settled by his administrator, showing that there were no personal assets, and in the absence of the first administrator's books and papers, against his heir, who, at his death, was an infant two years old. The staleness of the claim is conclusive against it. *Hillis v. Hamilton adm'r et als*, 10 Grat. 300.

41. In an action for a *devastavit* by a creditor against an executor and his sureties, the settled account of the executor was introduced which showed a credit to the executor of money paid to a legatee. The executor proposed to show by parol proof that the legatee paid was not a legatee of his testator, but of a person of whom his testator was the executor, and

had received sufficient assets to pay the legacy, but had not done it. **HELD:** The fact of such a legacy and that the executor's testator was the executor, should be proved by the will and the record of his qualification; and parol evidence is inadmissible for that purpose. *Millers v. Catlett*, 10 Grat. 477.

42. In a proceeding to recover damages for land, against the Upper Appomattox Company, under § 9, of act of February 23d, 1835, Sess. acts, p. 82, the jury having returned their reports, ascertaining the damages and the company having excepted to it and obtained a continuance, the plaintiff dies. The proceeding must be revived in the name of the personal representative and not of the heirs. *Upper Appomattox Co. v. Hardinge*, 11 Grat. 1.

43. In a suit by a legatee claiming upon the death of the legatee for life without heirs, against said legatee and a purchaser of one of the slaves so bequeathed, under an execution against him, another executor, who is also a legatee, is a competent witness for the contingent legatee, to prove the division of the slaves and the assent to the legacy. *Frazer's adm'r v. Beville et als*, 11 Grat. 9.

44. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors sue T and recover a judgment, and he enjoins it on the ground that G owed him for a legacy left him by R, of whom G was the executor, and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W. *Braxton, adm'r, &c. v. Harrison's ex'ors*, 11 Grat. 30.

45. In this injunction suit the executors of H and W and the administrator *de bonis non* of G. are parties, and the decree perpetuating the injunction is by consent; and they also consent to a decree directing an account of G's estate by his administrator. **HELD:** It is a case in which there may be a decree between co-defendants in favor of the executors of H against G's estate. *Ibid.*

46. To ascertain whether there were assets of G's estate to pay the debt, the account might be directed. *Ibid.*

47. If the decree against G's estate was doubtful, the consent of the representatives of W and G clearly authorized it. *Ibid.*

48. Though it was improper to perpetuate the injunction, yet as the administrator of G consented to the decree, and all the parties acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent administrator *de bonis non* of G. *Ibid.*

49. Ten years after the decree, the second administrator *de bonis non* of G. entered into a contract under seal, to pay the debt out of the assets when received; and the executors of H agreed to wait one year, to release their

costs in the suit, and dismiss it as to them. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid in the year, to cancel the agreement and proceed to enforce any of their existing remedies. The administrator did not collect assets within the year, and the executors sued in equity upon the agreement. **Held**: though the right of the executors of H to proceed against G's estate accrued when the injunction was perpetuated, yet the pendency of that suit carried on for their benefit, prevented the running of the statute of limitations against them. *Ibid.*

50. Though it is generally true, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, on which a suit may be maintained. *Ibid.*

51. That there was a sufficient consideration to sustain the agreement, and a suit could be maintained on it by the executors of H against the administrator, for payment out of the assets. *Ibid.*

52. That it was proper to sue in equity to have an account of, or for marshalling the assets; and this especially as the agreement being under seal, it is doubtful whether an action at law could be maintained upon it. *Ibid.*

53. Creditor qualifies as administrator on his debtor's estate, and after exhausting the personal assets in payment of debts, is still a creditor. In a suit by the heirs in the county court, the land is sold; and the administrator files a bill in the circuit court to enjoin the payment of the purchase money to the heirs, and asks to have it applied to his debt. **Held**: he is entitled to have the proceeds of the land applied to pay his debt. *Williams v. Williams et als.*, 11 Grat. 95.

54. The injunction should only go to restrain the payment of the purchase money to the heirs and should not restrain the collection of it by the county court. *Ibid.*

55. Though it would have been more regular for the administrator to connect himself by petition or bill, with the proceedings in the county court, in which the fund had been realized, yet there is no serious objection to the mode adopted by him. The county court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as the circuit court may appoint to receive it; or one of the suits may be removed to the court in which the other is pending. *Ibid.*

56. An action on the case against the personal representative of a vendor, for fraud in the sale of an unsound slave, to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty, or the fraudulent concealment of unsoundness, cannot be maintained; and though there is a judgment for the plaintiff, the error is not cured by the statute of jeofails, 1 Rev. Code, 1819, ch. 28, § 103, p. 511. *Boyles' adm'r v. Overby*, 11 Grat. 202.

57. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant: *Ibid.*

58. A personal representative cannot be sued, as such, for services or goods furnished to his testator or intestate's estate since his death. *Fitzhugh's ex'or v. G. Fitzhugh*, 11 Grat. 300.

59. It seems that an action will not lie against the personal representative, as such, for the funeral expenses of his testator or intestate. *Ibid.*

60. In some cases where money has been paid for a deceased person, an action for money paid will lie against the personal representative, as such: As where the money has been paid as a joint surety. *Ibid.*

61. Where the demands in all the accounts of the declaration are such that an action cannot, in any case, be maintained upon them against the personal representative, as such, then the description of him, as such, may be treated as surplusage, and the judgment may be against him personally. *Ibid.*

62. But if the demand set out in one of the counts may possibly be maintained against the personal representative, as such, then the description of him, as such, cannot be treated as surplusage; and if the action cannot be maintained against him in his representative character, it must fail. *Ibid.*

63. If an executor has assented to a legacy, and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery. But the intention to dispense with a refunding bond must be very clear. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

64. Under the circumstances, a person who had qualified as administrator upon an estate in Mississippi, held to account for his administration in Virginia. *Powell v. Stratton et als* 11 Grat. 792.

65. Courts of equity have jurisdiction, in all cases, to compel the delivery of a specific legacy by an executor. *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

66. The statute of limitations cannot bar the legatee's claim to his specific legacy, whilst it is held as such by the executor, though he has long before assented to the legacy. *Ibid.*

67. A delay of seventeen years by a specific legatee to sue for his legacy, held, under the circumstances, not to bar his claim. *Ibid.*

See ADMINISTRATION, AND LIMITATIONS, STAT. OF.

## PLEADINGS AT LAW.

1. DECLARATION,.

2. PLEAS,

3. DEMURRER,

4. OTHER PLEADINGS.

## DECLARATION.

1. The declaration in *Carrington v. Anderson*. 5. Munf. 32 on an indemnifying bond sustained upon demurrer. *Kevan v. Branch*, 1 Grat. 274.

2. The declaration charges a trespass in entering plaintiffs close and pulling down his house. The plea avers that the house was in immediate danger of taking fire, and of communicating fire to other houses. The replication to the plea avers that by a diligent use of the means in the power of the defendants the house might have been prevented from taking fire. This is no departure in pleading. *Beach v. Trudgain et als.*, 2 Grat. 219.

3. In declaring upon an acknowledgment of indebtedness in a deed, it is not necessary to set out more of the deed than that which contains the acknowledgment; and this according to its legal effect. *Newby v. Forsyth*, 3 Grat. 308.

4. In an action on an indemnifying bond, the declaration alleges that the obligors bound themselves to indemnify, &c. In the bond, they bind themselves, their heirs, executors and administrators, jointly and severally. This is no variance. *Dickinson v. Smith & Carter*, 5 Grat. 135.

5. There is a demurrer to each count in the declaration, and the demurrers are overruled; and then there is a trial on issues made up on pleas, and a verdict and judgment for the plaintiff. On appeal the judgment is reversed, the verdict set aside, and the demurrers sustained; and the cause is remanded for a new trial, with liberty to the plaintiff to amend his declaration. *White v. Toncray*, 5 Grat. 180.

6. In an action of waste by husband and wife against the alienee of the husband's interest in the wife's land, the declaration alleges that the reversion in fee is in the wife. This is in effect to allege that the reversion in fee is in the husband and wife; and if it is not sufficient on demurrer, is cured by the statute of *jeofails*. *Dejarnette v. Allen & wife*, 5 Grat. 499.

7. In trespass *quare clausum fregit*, it is proper to charge that the defendant ejected the plaintiff for a long space of time, viz: from thence hitherto; whereby the plaintiff, for and during all that time, lost and was deprived of the use and benefit of said close. *Bailey v. Butcher*, 6 Grat. 144.



8. In declaring in slander, if the words charged do not amount to slander, they cannot be helped by innuendo. *Moseley v. Moss*, 6 Grat. 534.

9. A demurrer to an entire declaration, whether general or special, raises the question, whether there be or be not, matter in the declaration sufficient to maintain the action. *Henderson v. Stringer*, 6 Grat. 130.

10. If there are several counts in a declaration, and one of them is good, that is sufficient to maintain the action, and a demurrer to the declaration must be overruled. *Ibid.*

11. If there be a single count containing several breaches, any one of which is well assigned, that is sufficient; and a demurrer to the whole count must be overruled. *Ibid. and Wright v. Michie*, 6 Grat. 354.

12. If there be a single count containing a demand of several matters which in their nature are divisible, any one of which is well claimed, that is sufficient. *Henderson v. Stringer*, 6 Grat. 130.

13. Whether the objection be that of one of several counts, or one of several branches, or that part of plaintiff's demand, which is of a distinct and divisible nature, is bad, the demurrer should be to that count, or to that breach, or to that part of the demand, as the case may be which is bad. *Ibid.*

14. A demurrer to a declaration, with a statement as special cause of demurrer, that one of the counts, or breaches, or parts of plaintiff's demand of a distinct and divisible nature, is bad, does not alter the character of the demurrer: and if there be matter enough in the declaration to maintain the action the demurrer must be overruled. *Ibid. and Wright v. Michie*, 6 Grat. 354.

15. Upon a demurrer to a declaration for a misjoinder of actions, the objection if well founded, goes to the whole declaration. *Ibid.*

16. In an action on an award, if upon the face of the submission it does not clearly appear that the award does not cover the whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of "no award," to which the plaintiff may reply and shew that the award does cover the whole matter submitted. *Price v. Via's heirs*, 8 Grat. 79.

17. An instrument binding the parties thereto to pay a certain sum of money purports to be under their hands and seals, but it is signed by one of the parties without a seal, and by the other parties with seals to their names. It may be sued upon against all the parties in one action as on a joint promise. *Rankin v. Roler et als.*, 8 Grat. 63.

18. In case for the breach of an express warranty of soundness of a personal chattel, it is not necessary to allege the defendant's knowledge of

the unsoundness; and if it is alleged it is not necessary to prove it. *Trice v. Cockran*, 8 Grat. 442.

19. In a declaration on a constable's official bond, the assignment of the breach did not set out specifically the claims put into the constable's hands, but stated that the relator had placed divers claims in his hands for collection, which were particularly set out in a receipt given by him as constable, and which was thereto annexed, marked A; and then proceeded to aver the collection of the moneys by the constable, and his failure and refusal to pay over to the relator. The breach was well assigned. *Governor for Davis v. Roach et als.*, 9 Grat. 13.

20. In an action on an appeal bond, the declaration states under a *scilicet*, the costs at a certain sum, and makes profert of the record of the court of appeals. The defendant craves oyer of the record, and demurs generally. The record is properly set out in all respects, but the costs endorsed by the clerk of the court of appeals is less than the sum stated in the declaration; that sum including the costs for entering the judgment of the court of appeals in the circuit court and issuing the execution upon it. HELD: 1st. The profert of the record did not extend to the endorsement of the costs by the clerk; and the variance as to the costs was no ground of demurrer. 2d., There was no variance, as the costs in the circuit court were properly embraced in the demand in the declaration. *Friend v. Woods*, 9 Grat. 37.

21. In dependant covenants in an action by a vendor of land against the purchaser for the purchase money, he must aver either that he had executed or that he had tendered a deed. The averment that he was ready and willing to convey is not sufficient. *Roach v. Dickinsons*, 9 Grat. 154.

22. In an action on a joint bond, all the obligees must join in the action, or some sufficient excuse for not joining them must be stated in the declaration, or the objection is fatal on demurrer. *Strange v. Floyd*, 9 Grat. 474.

23. In such an action non-payment of the debt to all the obligees must be averred in substance in the declaration, or the objection will be fatal on demurrer. *Ibid.*

24. A general *indebitatus assumpsit* may be joined with a count in *assumpsit* on a special contract of bailment, setting out the promises and undertakings of the defendants, the consideration on which it was founded, the breach of that promise by defendants, and their neglect and carelessness, and the loss of the plaintiff occasioned thereby. *Kennaird, &c. v. Jones*, 9 Grat. 183.

25. Upon a contract for the sale of a raft of logs, the balance of the price was to be paid when an act was done by the purchasers. In an action by the vendor to recover the price, he must aver that the act had been done, or that the purchasers had unduly neglected, failed and delayed to do it. *Ibid.*

26. A demurrer to a declaration is over-ruled in the court below, and the appellate court reverses the judgment. The cause will be sent back with directions that the plaintiff shall have leave to amend the declaration. *Strange v. Floyd*, 9 Grat. 474.

27. In an action upon a protested negotiable note against the makers and endorsers, the accidental omission of the sum for which the notes was given in the description of it in the declaration, where it appears from other parts of the same court, is not ground of demurrer. *Archer v. Ward*, 9 Grat. 622.

28. To recover back money paid upon a contract which has been rescinded, or the consideration of which has wholly failed, the usual and better mode of declaring is the common count for money had and received. But if the plaintiff declares specially it must appear with sufficient certainty, from the facts so set out, or from apt averments made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. *Johnsons ex'x v. Jennings adm'r*, 10 Grat. 1.

---

### PLEAS.

1. The declaration charges a trespass in entering plaintiffs close and pulling down his house. The plea avers that the house was in imminent danger of taking fire and of communicating fire to other houses, the replication to the plea alleges that by diligent use of the means in the power of the defendants, the house might have been prevented from taking fire. This is no departure in pleading. *Beach v. Trudgain et als.*, 2 Grat. 219.

2. In an action against a constable, for taking the property of the plaintiff, upon executions against third persons, he files a special plea, in which he sets up an indemnifying bond, executed by the plaintiffs in the executions. The plea need not set out the judgments on which the executions issued. *Davis v. Davis*, 2 Grat. 363.

3. It being necessary to plead a custom and acquiescence therein specially, as a defence to an action, and the proof thereof having been admitted under the general issue on the first trial, without objection by the plaintiff, the defendant will be allowed to amend his pleadings on the return of the case from the appellate court, and plead the matter specially. *Governor for Liggatt v. Withers*, 5 Grat. 24.

4. In an action on a bond given for the purchase money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds, which would require a rescission of the contract out of which the bond originated, and a re-investment of the obligee with the interest in the land alleged to have been sold to the obligor. *Shiflett, &c. v. The Orange Humane Society*, 7 Grat. 297.

5. In an action on a bond given for the price of a slave, a special plea under the act of 1831, may aver in general terms the unsoundness, and the knowledge and fraudulent concealment of the plaintiff; that on discovering the unsoundness the defendant offered to return the slave and demanded a rescission of the contract, which plaintiff refused; laying the damage to the whole amount of the price or not laying any damage, and praying for judgment in bar of the action. *Fleming v. Toler*, 7 Grat. 310.

6. There may be an averment of general unsoundness and then an averment of a specific unsoundness; and under this plea the defendant may prove any unsoundness. *Ibid.*

7. A plea which professes to go to the whole action, but answers only a part of it, is defective and demurrable. *Hunt's adm'r v. Martin's adm'r*, 8 Grat. 578.

8. The plea of *non damnificatus* is a good plea only where the condition is to indemnify and save harmless. The plea should go to the right of the action, and not to the question of damages. *Archer v. Archer's adm'r*, 8 Grat. 539.

9. Whenever the plea of *non damnificatus* is a good plea, it is equivalent to the plea of "conditions performed;" and if this last plea has been pleaded, it is not error to refuse to admit the first at a subsequent term. *Ibid.*

10. A plea in abatement of a former action must aver the pendency of the action at the time of the plea pleaded. *Archer v. Ward*, 9 Grat. 622.

11. Duplicity in a plea can only be objected to by special demurrer. *Cunningham v. Smith et als.*, 10 Grat. 255.

---

### DEMURRER.

1. Demurrer to declaration on indemnifying bond sustained. *Governor for Leightons v. Hinchmans*. 1 Grat. 156.

2. Demurrer to declaration upon the official bond of an executor overruled. *Bush v. Beale*, 1 Grat. 229.

3. Demurrer to counts of a declaration upon a bill of exchange sustained as to some, and overruled as to others. *Bank U. S. v. Beirne et als.*, 1 Grat. 539.

4. Neither the Commonwealth nor the accused has the right to demur to the evidence in a criminal prosecution, except with the consent of the other party. *Doss' case*, 1 Grat. 557.

5. Demurrer to indictment for perjury sustained. *Roache's case*, 1 Grat. 561.

6. On a demurrer to evidence the demurrant admits all that can be reasonably inferred by a jury from the evidence given by the other party and waives all the evidence on his part which contradicts that offered by the other party or tends to establish a case, inconsistent with the case proved by the evidence of the other party. *Tutt v. Slaughter's adm'r*, 5 Grat. 364.

7. A demurrer to an entire declaration, whether general or special, raises the question whether there be or not, matter in the declaration sufficient to maintain the action. *Henderson v. Stringer*, 6 Grat. 130.

8. If there are several counts in a declaration and one of them is good, that is sufficient to maintain the action and a demurrer to the declaration must be overruled. *Ibid*.

9. If there be a single count containing several breaches, any one of which is well assigned; that is sufficient and a demurrer to the whole count must be overruled. *Ibid & Wright v. Michie Id.*, 354.

10. If there be a single count containing a demand of several matters, which in their nature are divisible, any one of which is well claimed, that is sufficient. *Henderson v. Stringer Ibid*, 130.

11. Whether the objection be that one of several counts or one of several breaches or that part of plaintiff's demand which is of a distinct and divisible nature is bad, the demurrer should be to that count or to that breach or to that part of the demand, as the case may be which is bad. *Ibid*.

12. A demurrer to a declaration with a statement as special cause of demurrer, that one of the counts or breaches or parts of plaintiff's demand of a distinct and divisible nature is bad, does not alter the character of the demurrer; and if there be matter enough in the declaration to maintain the action, the demurrer must be overruled. *Ibid & Wright v. Michie, Id.* 354.

13. Upon a demurrer to a declaration for a misjoinder of actions, the objection if well founded goes to the whole declaration. *Id.*, 130.

14. If in an action upon an award, it does not clearly appear that the award does not cover the whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of no award. *Price v. Via's heirs*, 8 Grat. 79.

15. So if the parties may have waived a decision on one branch of the matters submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of no award. *Ibid*.

16. In an action at law, the defendant demurs to the declaration and afterwards agrees the facts and that the court shall render a judgment on

the case agreed. He thereby waives his demurrer. *Roach v. Gardiner*, 9 Grat. 89.

17. In an action upon a protested negotiable note, against the makers and endorsers, the accidental omission of the sum for which the note was given in the description of it in the declaration, where it appears from other parts of the same count, is not ground of demurrer. *Archer v. Ward*, 9 Grat. 622.

18. A demurrer to a declaration overruled and judgment for plaintiff which upon appeal is reversed and demurrer sustained; the cause will be sent back with leave to the plaintiff to amend his declaration. *Fitzhugh's ex'or v. G. Fitzhugh*, 11 Grat. 300.

---

### OTHER PLEADINGS.

1. The declaration charges a trespass in entering the plaintiffs close and pulling down his house. The plea avers that the house was in imminent danger of taking fire and of communicating fire to other houses. The replication to the plea avers that by a diligent use of the means in the power of the defendants the house might have been prevented from taking fire. This is no departure in pleading. *Beach v. Trudgain et als.*, 2 Grat. 219.

2. It is not necessary to state in the replication the means by which the house might have been prevented from taking fire. *Ibid.*

3. A replication to a plea relying on a covenant, but failing to make profert of it, is demurred to, and the demurrer is sustained on this ground. It is proper to allow the plaintiff to amend the replication by adding the profert of the covenant. *Bowles' ex'or v. Elmore's adm'x*, 7 Grat. 385.

4. If the parties may have waived a decision on one branch of the matters submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of "no award." *Price v. Via's heirs*, 8 Grat. 79.

5. In an action at law, the defendant demurs to the declaration, and afterwards agrees the facts, and that the court shall render a judgment on the case agreed. He thereby waives his demurrer. *Roach v. Gardner*, 9 Grat. 89.

6. Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea denying that the principal was deputy, and the high sheriff replies specially, relying on their bond as an estoppel. The replication is good, though it has not the commencement and conclusion peculiar to a pleading of an estoppel. *Cecil v. Early et als.*, 10 Grat. 198.

7. The statute, Sess. Acts, 1844, ch. 70, p. 54, in relation to pleading

usury, though in terms only applicable to a plea, is properly applicable to a replication to a plea of set-off. *Hope v. Smith, sheriff*, 10 Grat. 198.

8. In debt on a bond, a plea that it was given for goods bought of the plaintiff who represented that they were sound and marketable, when, in fact, they were unsound and damaged; and that the plaintiff, at the time of making them, knew that the representations were untrue, and knowingly made them with the intent to defraud the defendant; and proceeds to set out the unsoundness of numerous articles purchased, and to detail particulars in which the representations had turned out to be untrue. This is a good plea. *Cunningham v. Smith et als.*, 10 Grat. 255.

9. A *scire facias* to revive a judgment stated that the judgment had been suspended by injunction. This was unnecessary, and may be regarded as surplusage; and a plea in bar that the judgment had not been suspended by injunction offered no bar to the *scire facias*. *Richardson's adm'r v. Prince George Justices*, 11 Grat. 190. *Poindexter's adm'r v. Same. Id.*

10. The *scire facias* further stated that the injunction had been dissolved. A plea that it had not been dissolved is bad, and an issue made up upon it is immaterial. Therefore, though improper evidence is admitted upon it, it is no cause for reversing the judgment. *Ibid.*

## PLEADINGS IN EQUITY.

1. Defendants demurrer to a bill being overruled, he may file any sufficient answer. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. Demurrer to bill for discovery and relief overruled. *Ibid.*

3. Demurrer to bill for uncertainty overruled. *Ibid.*

4. Demurrer to bill for want of proper parties overruled. *Ibid.*

5. When bill for discovery and relief sufficiently certain. *Ibid.*

6. If the objection to the discovery called for in a bill appears upon the face of the bill, defendant may demur. *Ibid.*

7. If the objection to discovery called for, does not appear upon the face of the bill, the defendant must claim his protection by plea or answer, the averments of which if traversed by replication must be established by sufficient evidence. *Ibid.*

8. If a plaintiff seeking a discovery relies upon the fact that a prosecu-

tion would be barred by the statute of limitations, this fact should appear from the statements of the bill. *Ibid.*

9. Demurrer to bill to recover land sold for taxes and purchased by the sheriff overruled. *Taylor's devisees v. Stringer*, 1 Grat. 158.

10. The relief given in equity must be limited by the pleadings. *Swope v. Chambers*, 2 Grat. 319.

11. A court of equity can only decree upon the case made by the pleadings, though the evidence may shew a right in the plaintiff to a further decree. *Mundy v. Fawter et als.*, 3 Grat. 518.

12. When a bill, in form of a foreign attachment, sets out a case for equitable relief, and contains a prayer for general relief, it will be treated as a bill for equitable relief. *Anderson et als. v. De Soer*, 6 Grat. 518. *Same v. Gallego's adm'r et als.* *Id.*

13. A defendant, though in default for want of an answer, ought to be permitted to file any proper answer, at any time before a final decree; but the trial of the cause is not to be thereby delayed unless for good cause shown. *Bowles v. Woodson*, 6 Grat. 78. *Bean et al. v. Simmons*, 9 Grat. 389.

14. QUÆRE: What is a final decree in the sense of the statute, Sup. Rev. Code, 1819, p. 130? *Ibid.*

15. A defendant in default for want of an answer, files a demurrer to the bill, which is over-ruled; he is not entitled to two months in which to file his answer. *Reynolds v. The Bank of Va.*, 6 Grat. 174.

16. Where a plaintiff comes into equity on the ground of discovery, the whole answer is to be read, if it is used at all, as the testimony of a witness: and no part of it pertinent to the discovery is to be rejected, because it is affirmative matter, in avoidance of that which is admitted to be true. But though the answer is to be read, it is subject to be discredited in the same manner as the testimony of any other witness. *Lyons v. Miller*, 6 Grat. 427.

17. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court, and not a subject of appeal. *Craig v. Sebrell*, 9 Grat. 131.

18. But if otherwise, the exception being sustained, and the defendant having filed another answer, there the subject of the exception is properly ended. *Ibid.*

19. Plaintiff, after setting out his case in his bill, states what he understands is the pretension of the defendant. This is not such an allegation as will constitute the answer responsive thereto, evidence, and thus throw



the burthen of disproving it upon the plaintiff. *Leas' ex'or v. Eidson*, 9 Grat. 277.

20. A demurrer to a bill against an absent defendant, for the failure to aver that an attachment had issued, can not be sustained, because the statute in terms *provides* that this process may issue after the institution of the suit. *O'Brien et als v Stephens et als.*, 11 Grat. 610.

---

POWERS.

1. A. in a letter authorizes B. and C. to use his name as endorser. This is a joint power to be jointly exercised. *Union Bank of Maryland v. Beirne*, 1 Grat. 226.

2. Under this power B. endorsed the name of A. upon certain bills, but it did not appear to be done, as by an agent. After some of these bills had been protested, A. wrote at the foot of the letter "the above is my signature, the legal liabilities of which I hereby acknowledge." Afterwards B. again endorses the name of A. upon other bills in the same manner. A. is not liable on these endorsements. *Ibid.*

3. A letter of Attorney giving authority to the agent to endorse the names of his principals as sureties, construed. *Bank of U. S. v. Beirne*, 1 Grat. 234.

4. An authority to make a joint endorsement of several persons will not authorize a several endorsement. *Ibid.*

5. A marriage settlement gives a power to the wife, to dispose of the settled estate by gift, or devise under her hand and seal, attested by two or more witnesses. Held: 1st, A testamentary paper signed by the wife, with a scroll annexed to her name and attested by the requisite number of witnesses, though the scroll is not recognized in the body of the instrument is a valid will under the power. 2nd, That such a paper duly executed, referring to and recognizing another testamentary paper previously executed according to the statute concerning wills, but not according to the power, will constitute the paper recognized, a valid testamentary paper. 3rd, To give validity to the paper recognized, it is not necessary that it should be incorporated into the paper recognizing it. It is not necessary that the attestation clause shall state that the paper was duly signed and sealed by the testatrix. 4th, Parol testimony is admissible to shew that the scroll was put upon the paper, by the direction of the testatrix, as a seal. 5th, Though the name of the witness was put to the paper, not as a witness, but for some other reason, yet, if the testatrix afterwards requests the witness to attest the paper, and she adopts the signature already there, it is a valid attestation. *Pollock and wife v. Glassel*, 2 Grat. 439.

6. A deed having been executed by a person professing to act under a power of attorney from the owner of the land conveyed, and a sufficient time having since elapsed to bar a writ of right without any claim by the original owner or his heirs, a presumption amounting to full proof arises, that the person professing to act under the power was duly authorized to execute the deed. *Goodwin v. McCluer*, 3 Grat. 291.

7. A power of attorney may be admitted to record on the acknowledgment thereof before two justices of the peace, though the certificate does not certify the instrument to any court or clerk's office for the purpose of being recorded. *Shanks et als v. Lancaster*, 5 Grat. 110.

8. The act, 1 Rev. Code, ch. 99, § 15, p. 365, does not embrace powers of attorney, or authorize two justices to take and certify the privy examination of the wife as to her execution thereof. *Ibid*.

9. A deed of husband and wife executed under a power of attorney, is the deed of the husband, though it is void as to the wife, the power being void as to her. *Ibid*.

10. The deed of the collector of the direct tax, under the act of Congress of 9th January, 1815, does not furnish *prima facie* evidence of the regularity of his proceedings. *Jesse v. Preston*, 5 Grat. 120. *Keith v. Preston*. *Id*.

11. A party claiming title under a deed from a collector of the United States, for land sold for the direct tax, must show that everything has been done which the law requires to be done before making the sale. *Ibid*.

12. The deposition of the collector in general terms that everything had been done precisely as the law required, is not sufficient evidence of the fact. *Ibid*.

13. The recitals in the deed of the marshal, purporting to convey land under a decree, are no evidence of his authority to convey, against an adverse claimant. *Masters v. Varner's ex'ors*, 5 Grat. 168.

14. A decree directing a conveyance of land by the marshal is not of itself competent evidence of the marshal's authority to convey the land embraced in his deed, unless it designates the land directed to be conveyed; but the whole record, or so much as will show the land intended by the decree, must be produced with it. *Ibid*.

15. By a marriage settlement, the whole interest in the wife's property is vested in her. She has the full power of disposing of or charging her personal estate, to all intents and purposes, as if she were a *feme sole*; and, this, though there is a clause prescribing the mode of disposition. *Woodson, trustee v. Perkins*, 5 Grat. 345.

16. A wife having absolute power of appointment over land, or writing under her hand and seal, or last will and testament, her deed, by which she

relinquishes her right for value, destroys her power of appointment, though she is not privily examined. *Hume v. Hord et als.*, 5 Grat. 374.

17. The wife having the absolute right to give the land to whom she pleases, by the execution of her power of appointment, she has the right, for value, and with the assent of all persons interested in the land, to destroy the power in the same mode. *Ibid.*

18. A commissioner for the sale of delinquent lands, conveys under a power, and a deed executed by him to other persons than those reported by him as the purchasers, can avail nothing where his authority to make it does not appear, unless long acquiescence and possession raise a presumption in its favor. *Walton v. Hale*, 9 Grat. 194.

19. A devise that executors shall sell land, confers a naked power; but when coupled with directions that the proceeds shall be equally divided between specified persons, it vests in the executors an interest and a trust, and it is their duty to take possession of the land, and account for the rents and profits. *Mosby's adm'r et als. v. Mosby's adm'r*, 9 Grat. 584. *Miller v. Jones et als.* *Id.*

20. One of the executors having died, and the other having been removed, and administration committed to the sheriff, under the act of 1819, 1 Rev. Code, ch. 104, § 52, p. 388, he was authorized as such administrator, to execute the power and trust, and is liable for the rents. *Ibid.*

21. A power of attorney and a deed of trust to secure debts are made at the same time, by and to the same party, having reference to merely the same property, and the same debts. The power of attorney is not revoked by the deed; but they will be considered as one instrument, and construed together. *French v. Townes et als.*, 10 Grat. 513.

22. A testator says, having implicit confidence in my wife F., and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said wife, F., with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think right. By a subsequent clause, it was provided, that if F. died without making a will, the children should have an equal share of his estate. HELD: 1st. That F. has an unlimited discretion as to the time and manner of distributing the property among the testator's children. She may distribute it, or any part of it, in her life-time or at her death, by any instrument adapted to pass property of the kind which she distributes; and she may distribute to either child such kind of property as she may choose to give him or her. 2nd. That F. may sell the whole or any part of the property and distribute the proceeds of sale. 3rd. That F. having a discretion as to the time and manner of distribution, a purchaser of land from her is not bound to see to the application of the purchase money. 4th. Quære: if each child is entitled to have ultimately an equal share of the estate. *Steele v. Levisay et als.*, 11 Grat. 454.

See PRINCIPAL AND AGENT, AND WILLS.

## PRACTICE AT LAW.

1. EVIDENCE,
2. INSTRUCTIONS,

3. NEW TRIALS,
4. OTHER MATTERS.

---

 EVIDENCE.

1. Interest paid on a bond in advance for three years, and this stated in the bond ; but paid in land at a price fixed in reference to the annual interest for three years, is not usurious ; and plaintiff may prove the facts on the trial. *Porterfield v. Coiner*, 4 Grat. 55.

2. To repel the intent to take usurious interest, plaintiff may show the value of the land at the time of the contract. *Ibid.*

3. On the warranty of soundness of an animal, it is for the jury to say what is embraced therein ; and on that question the qualities and uses for which the animal is purchased and sold, may be referred to as explaining what was intended to be included in the warranty. *Thornton v. Thompson et als.*, 4 Grat. 121.

4. If the court permits improper interrogatories to be filed, and directs them to be answered, the party to whom they are directed may answer them, and on the trial of the cause may object to their admission as evidence. *Poindexter, &c. v. Davis et als.*, 6 Grat. 481.

5. A party to a cause, is not bound to answer interrogatories which may subject him to a penalty or forfeiture. *Ibid.*

6. This rule is not confined to cases where the purpose of the suit is to enforce the penalty or forfeiture, but extends to those where the discovery itself would expose the party to some action, or any criminal or penal prosecution, tending to the like result. *Ibid.*

7. In *assumpsit*, defendant pleads "*non assumpsit*," and with it files an affidavit of set-off, and the set-off, which is a note. Though there is no plea of set-off or bill of particulars, the evidence in relation to the set-off is properly admitted. *Bell v. Crawford*, 8 Grat. 110.

8. In an action on a constable's official bond, the assignment of the breach sets out specifically the claims for which his receipt was given, but an error is committed in stating the amount of one of the claims. This is no good ground for excluding the receipt as evidence as to the other claims, which are correctly described ; but the jury should be instructed that it is not evidence as to the claim not correctly set out. *Governor for Davis v. Roach et als.*, 9 Grat. 13.

9. In an action of trespass, assault and battery, the plea is "*son assault*

*demesne*," and the replication is "*de injuria*." It is the plaintiff's right to introduce his evidence first. *Young v. Highland*, 9 Grat. 16.

10. In such a case, if the defendant is permitted to commence and introduce his evidence first, it is still the right of the plaintiff to introduce his evidence to prove the assault and battery charged in the declaration. *Ibid*.

11. It is the right of the plaintiff to commence and introduce his evidence in all cases for unliquidated damages, though the general issue is not pleaded; whether the action is *ex delicto*, or *ex contractu*. *Ibid*.

12. Where a party moves the court to exclude evidence, he should specify the evidence to which he objects. And where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly over-ruled on account of its generality. *Friend v. Wilkinson & Hunt*, 9 Grat. 31.

13. The act incorporating the North-western Bank of Virginia is a public act, of which the courts will take judicial notice; and in an action by the bank, it is not required to prove its incorporation. *Hays v. North-western Bank of Va.*, 9 Grat. 127.

14. A party complaining of the admission of improper evidence, must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court, that the evidence was improper. *Johnson's ex'x v. Jennings adm'r*, 10 Grat. 1.

15. The affidavit of a witness that from his age and infirmities he is unable to attend the court without endangering his life, made eight days before the cause is called for trial, is sufficient to authorize his deposition; which had been taken *de bene esse*, to be read as evidence. *Taylor v. Smith*, 10 Grat. 557.

16. Upon a motion by a creditor against a high sheriff for the default of his deputy in permitting a debtor in execution to escape, the court occupies the place of a jury as to the facts, and is bound, upon a return of "*executed*," and upon proof of escape, to presume that it was with the consent of the sheriff, unless he proves that it was without his consent or negligence, and that he had used due means to re-take the prisoner. *Stone v. Wilson*, 10 Grat. 529.

17. Whether a plaintiff shall be permitted to introduce further evidence, after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause, and its exercise will rarely, if ever, be controlled by an appellate court. Clearly, he has a right to introduce evidence to rebut that of the defendant. *Brooks v. Wilcox*, 11 Grat. 411.

18. Though the defendant has announced that he is through with his parol evidence, yet, under circumstances, the court should permit him to recall a witness for the plaintiff, who had referred to the plaintiff's books, and to have them produced. *McDowell's ex'or v. Crawford*, 11 Grat. 378.

19. If a deed of the defendant is introduced collaterally upon a trial, as evidence, he may show that it is not his deed, without making oath to the fact. And for this purpose he may introduce a subscribing witness to it, to prove that it was misread to the defendant. *Harrison v. Middleton*, 11 Grat. 527.

20. A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another. But he must then speak from his own recollection, thus refreshed. *Ibid.*

21. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer to the courses and distances on the diagram, though he may not be able to remember them independent of it. The diagram is itself evidence, and he may point out on it the lines he ran. *Ibid.*

22. An extract or copy from his field notes, taken by a surveyor, is not evidence; and he can only use it to refresh his memory, and must then speak from his recollection. *Ibid.*

23. A witness is called who is objected to as being interested, and proof *aliunde* of his interest is introduced. He is then examined on his *voir dire* by the party calling him, to show that he has no interest, and this is objected to by the other party; but, before he is sworn in chief, a deed is produced, which shows he has no interest. If it was error to examine him on his *voir dire*, it was cured by the proof of his want of interest before he was sworn in chief. *Ibid.*

## INSTRUCTIONS.

1. In a joint action of trespass against several, who plead jointly, it is not correct for the court to instruct the jury that they may sever in the damages and assess what respectively, in their opinion, each party found guilty ought to pay. *Crawford v. Morris*, 5 Grat. 90.

2. In such case the jury should assess against all who are found guilty, the amount which they think the most guilty should pay; the above instruction therefore is not an error of which the defendant can complain in an appellate court. *Ibid.*

3. An opinion expressed by the court upon the first trial of a cause, where there was no verdict or the verdict was set aside, is improper for the consideration of the jury on a second trial, unless asked for. *Ibid.*

4. If such opinion be relied on at the second trial, the appellate court will consider it, and if it is erroneous will reverse the judgment and award a new trial. *Ibid.*

5. If there is any evidence before the jury tending to prove a case supposed in the instruction asked for, if the instruction propounds the law

correctly, it should be given. *Hopkins, Brother & Co. v. Richardson*, 9 Grat. 485.

6. An instruction which is not relevant to the evidence in the cause or which is only relevant to written evidence which does not sustain it may be properly refused. The court being the proper tribunal to construe the written evidence. *Johnson's ex'x v. Jennings adm'r*, 10 Grat. 1.

7. In ejectment, the Court of Appeals having decided that certain evidence is insufficient to establish adverse possession; upon a second trial the evidence being substantially the same, the party in whose favor the decision is entitled to have an instruction to the jury to disregard all the parol evidence, introduced for the purpose of proving the adversary possession. *Pasley v. English*, 10 Grat. 236.

8. The evidence of adversary possession being to be disregarded, it is error to instruct the jury that if such evidence proves an adversary possession of twenty years, under claim of title, the party is entitled to recover. *Ibid.*

9. The court may refuse to give an instruction, because it is so obscurely expressed as to leave in doubt the meaning intended. *Levasser v. Washburn*, 11 Grat. 572.

10. The court should refuse to give an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause, or where it is irrelevant or not applicable to the evidence. *Kincheloe v. Tracewell*, 11 Grat. 587.

11. Upon a motion by the plaintiff to instruct the jury to disregard all the documentary evidence of the defendant, of which some parts are legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is legal and which illegal. *Ibid.*

### NEW TRIALS.

1. The court before which a cause has been tried, may, upon overruling a motion for a new trial, refuse to certify the evidence or the facts, where the testimony is conflicting or depends upon the credibility of the witnesses, which is impugned. *Taliaferro v. Franklin*, 1 Grat. 332.

2. Where a trial is had before a jury and they cannot agree upon a verdict or do agree upon a verdict, which is set aside by the court and a new trial awarded, upon the new trial, any opinion expressed by the former jury or by the court upon a former trial is improper for the consideration of the jury. *Crawford v. Morris*, 5 Grat. 90.

3. If an opinion or instruction of the court, given on the former trial is relied on before the jury on the second trial, by the party in whose favor it was given, without asking for such instruction from the court, and a verdict and judgment are rendered for him, the appellate court will consider

the opinion or instruction so relied on, and, if it is erroneous, will reverse the judgment and award a new trial. *Ibid.*

4. Under the circumstances, a verdict was set aside on the evidence of jurors that they rendered their verdict under a mistake as to its legal effect. *Moffett v. Bowman*, 6 Grat 219.

5. A verdict which is in all respects fair, and, in the judgment of the court which tried the cause, in conformity to the evidence, will not be set aside on the testimony of a few of the jurors that they had been induced to agree to the verdict under a misapprehension of an instruction of the court. *Harnsbarger's adm'r v. Kinney*, 6 Grat. 287.

6. A court having granted a new trial of a cause, there is a motion to reconsider the opinion, and the court takes time till the next term to consider the motion, and at the next term sets aside the order granting the new trial, and enters a judgment on the verdict. There is no error in continuing the motion. *Rhea v. Gibson's ex'or*, 10 Grat. 215.

7. A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, is a ground for a new trial. *McDowell's ex'or v. Crawford*, 11, 378.

#### OTHER MATTERS.

1. The court below having given judgment for the plaintiff in a scire facias against bail for too large an amount, the appellate court will reverse the judgment and give judgment for the proper sum. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

2. Where a suit has been brought against a member of the General Assembly, and the process has been served upon him, and an office judgment entered up against him at the rules, and confirmed while his privilege existed, he may at the next term of the court, though his privilege has then ceased, upon motion, have all the proceedings subsequent to the issue of the process set aside, and the cause remanded to the rules. *McPherson v. Nesmith and wife*, 3 Grat. 237.

3. Interest paid on a bond in advance for three years, and this stated in the bond, but paid in land at a price fixed in reference to the annual interest for three years, is not usurious; and plaintiff may prove the facts on the trial. *Porterfield v. Coiner*, 4 Grat. 55.

4. To repel the intent to take usurious interest, plaintiff may shew the value of the land at the time of the contract. *Ibid.*

5. A motion to quash a writ and inquisition founded on a judgment, must be made in the name of a party on the record, and must be against such a party. *Wallop's adm'r v. Scarborough et als.*, 5 Grat. 1.



6. A stranger having acquired an equitable right to the benefit of an execution, or to the property on which it is levied, will generally have authority to sue out and conduct the process, or to object to its regularity or validity ; but he must do it in the name of a legal party to the process, or one who can be made so. And his authority to use the name of the party to the process in a court of law will be so far recognized by such court as to preclude the intervention of such party for the purpose of defeating it. *Ibid.*

7. On a motion for a continuance of a cause on account of the absence of witnesses, if the facts expected to be proved by them are stated, and it does not appear that the proof of the facts might be material on the trial, the continuance should be refused. *Nash v. Upper Appomattox Company*, 5 Grat. 332.

8. In an action on an indemnifying bond, the relator claims title to the property sold under a sale by deed made by one partner without the knowledge or consent of the other, of partnership property. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration, of his ownership of the property. *Forkner v. Stuart &c.*, 6 Grat. 197.

9. A defendant in an action at law, not having entered his appearance, either at rules or in term, has a right on the calling of the cause to object that it has not been legally matured for trial. *Hickson v. Larkey*, 6 Grat. 210.

10. In considering such objection all the process, returns and proceedings are necessarily a part of the record, and are to be looked into. *Ibid.*

11. A writ which purports to be a *pluries capias* but which is without date, and is not attested by the clerk, is wholly null and void as process ; and an order based thereon, directing a proclamation to issue, and all the subsequent proceedings are without warrant and illegal. *Ibid.*

12. A county court makes an order opening a road, but does not direct the damages assessed to the contestant to be paid to him. The court may, at the next term, with the consent of the parties, reinstate the cause. *White v. Coleman*, 6 Grat. 138.

13. On a warrant of unlawful entry and detainer against two, the warrant is executed on one, but not on the other : The plaintiff may proceed against the one upon whom the warrant has been executed. *Harman v. Odell*, 6 Grat. 207.

14. No further proceedings can be had upon that warrant against the one upon whom it has not been executed, before the return day thereof. *Ibid.*

15. A tender of money in payment of a judgment will not authorize the

quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Grat. 592.

16. The penalty and condition of a bond for the payment of money are in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment. *Fleming v. Toler*, 7. Grat. 310.

17. Judgment by default against an executor *de bonis propriis*: If erroneous it should be corrected by motion to the court and not by appeal. *Snead v. Coleman & wife*, 7 Grat. 300.

18. In a proceeding of forcible entry and detainer, the court is constituted and then adjourns to a day certain. The court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law to the next term of the county court. *Mann v. Gwinn et als.*, 8 Gratt. 58.

19. Upon an appeal by the overseers of the poor from a judgment of the county court in a case against the putative father of a bastard child, the circuit court upon reversing the judgment, should not send the case back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Grat. 139.

20. The disregard by the circuit court of a rule adopted by itself, for the regulation of the practice there, is not a ground of appeal. *Hudson v. Kline*, 9 Grat. 379.

21. An action may be brought on an injunction bond, where the injunction is dismissed at rules, before the order is confirmed in court. *Roach v. Gardner*, 9 Grat. 89.

22. An endorsement of the name of the sheriff on a prison bounds bond, before an action is brought upon it, is a sufficient assignment thereof, and the action may be maintained by the creditor as assignee, without writing out the assignment, or the assignment may be written in the progress of the trial. *McGuire et als. v. Pierce, assignee, &c.*, 9 Grat. 167.

23. A party complaining of the admission of improper evidence must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court, that the evidence was improper. *Johnson's ex'x v. Jennings' adm'r*, 10 Grat. 1.

24. The affidavit of a witness that from his age and infirmities he is unable to attend the court without endangering his life, made eight days before the cause is tried is sufficient to authorize the reading of his deposition, which had been taken *de bene esse*. *Taylor v. Smith*, 10 Grat. 557.

25. Upon a motion by a creditor against a high sheriff for the default of

his deputy in permitting a debtor, in execution to escape, the court occupies the place of a jury as to the facts and is bound upon a return of "executed" and upon proof of escape, to presume that it was with the consent of the sheriff, unless he proves that it was without his consent or negligence and that he had used due means to retake the prisoner. *Stone v. Wilson*, 10 Grat. 529.

26. It was not improper before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant against a person for whose benefit the suit was brought, when the defendant succeeded in the case. *Pates v. St. Clair*, 11 Grat. 22.

27. A judgment being rendered by consent of parties, by their attorneys, is a judgment by consent of the attorney of the party for whose benefit the suit was brought. *Ibid.*

28. If a case of unlawful detainer has been pending in the county court for more than twelve months without a final decision, it may be removed on motion, to the circuit court. *Harrison v. Middleton*, 11 Gratt. 527. *Kincheloe v. Tracewells*, *Id.* 587.

29. All civil causes of which the circuit court has either original or appellate jurisdiction, may be removed from the county to the circuit court, upon motion, after they have been pending in the county court for one year. *Ibid.*

30. The year is to be counted from the organization of the court summoned to try the unlawful detainer. *Ibid.*

31. An action on the case against the personal representative of a vendor, for fraud in the sale of an unsound slave, to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty, or the fraudulent concealment of unsoundness, cannot be maintained; and though there is a judgment for the plaintiff the error is not cured by the statute of jeofails; 1 Rev. Code 1819, ch. 28, § 103, p. 511. *Royles' adm'r v. Overby*, 11 Grat. 202.

32. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant. *Ibid.*

See PLEADINGS AT LAW.

---

## PRACTICE IN CHANCERY.

- |                            |                        |
|----------------------------|------------------------|
| 1. BILLS AND PETITIONS,    | 5. DECREES AND ORDERS, |
| 2. ANSWERS,                | 6. RELIEF.             |
| 3. EVIDENCE,               | 7. IN APPELLATE COURT, |
| 4. ISSUES OUT OF CHANCERY, | 8. OTHER MATTERS.      |

## BILLS AND PETITIONS.

1. If the objection to a discovery appears upon the face of the bill, the defendant may demur to it. *Northwestern Bank v. Nelson*, 1 Grat. 108.

2. A bill having been taken for confessed as to one of several sureties in a guardians bond, which is void, should be dismissed as to him as well as to the others who had made defence. *Austin v. Richardson*, 1 Grat. 310.

3. A bill should not be dismissed for defect of parties, if the plaintiff has shewn himself entitled to relief on the merits; but he should be allowed to amend his bill, and make the necessary parties. *Jameson's adm'r v. Deshields*, 3 Grat. 4.

4. A cause is ready for decision as to the substantial parties at a regular term of the court. At a following intermediate term, the plaintiff amends his bill to which a formal party, who comes in and answers at the same term, and consents that the cause may be then heard. The court may hear the cause at the intermediate term, though it is objected to by a substantial party, as to whom it was ready at the preceding regular term. *Robinson's exor's v. Day*, 6. Grat. 56.

5. Bill by party having a life estate in slaves, to enjoin the removal of the slaves from the State, by party in possession claiming them. The plaintiff dies, the remainderman may then file his bill in the same court for the same objects. *Ibid.*

6. Though a deed of trust secures creditors in several classes, one or more may sue for the benefit of all, to have the trusts executed, where the trustees refuse to act. *Reynolds v. The Bank of Virginia et als.*, 6 Grat. 174.

7. Legatees having obtained a decree ascertaining the rights of all, on another bill to enforce the decree, they seeking satisfaction out of a common fund, it is proper for all of them to unite in one suit to get the benefit of the former decree in their favor; and the bill is not multifarious. *Sheldon et als. v. Armstead's adm'r et als.*, 7 Grat. 264.

8. If the first decree was in favor of all, and on appeal this decree was affirmed, though the decree in the court below, for some cause, omits to de-

eree in favor of one legatee, he may unite with the others in a bill to enforce the first decree. *Ibid.*

9. Heirs residing out of the State having instituted a suit for the sale of land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the court to collect them, a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the court to be made a party in the cause and to have the fund applied by proceedings in that cause to the payment of his debt.

Or if he proceeds by foreign attachment, the commissioner should be a party, and be restrained by endorsement on the process from disposing of the proceeds.

Or if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands. And the commissioner, though a party as administrator of the debtor to the creditor's suit, but having in fact no knowledge of the object of it, paying over the money to the heirs under the order of the court whose commissioner he is, will not be affected by the *lis pendens* of the creditor's suit, so as to be liable to pay it over again to the creditors. *Carrington et als. v. Didier, Norvell & Co.*, 8 Grat. 260.

10. Where there is a proper case upon the merits for relief, the bill should not be dismissed for want of parties, or of proof that the parties are what they profess to be; but the court should direct the plaintiffs to amend their bill and make the proper parties, and direct a commissioner to ascertain and report the persons entitled to the property. *Ball et als. v. Johnson's ex'or et als.*, 8 Grat. 281.

11. A bill being filed for a specific execution of a contract for the exchange of lands, if it appears in the progress of the cause that the defendant cannot comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract, and for such other relief as under the circumstances he is entitled to. *Parrill v. McKinley*, 9 Grat. 1.

12. A bill of injunction to a judgment at law, shewing no equity upon its face, may be dissolved without answer. *Slack v. Wood*, 9 Grat. 40.

13. A party having an interest in the subject of a suit, but suing in a wrong character, his bill will not be dismissed, but he will have liberty to amend and make the proper parties. *Sillings et als. v. Bumgardner, guardian*, 9 Grat. 273.

14. Plaintiff, after setting out his case in his bill, states what he understands is the pretension of the defendant. This is not such an allegation as will constitute the answer responsive thereto evidence, and throw the burden of disproving it upon the plaintiff. *Leas' ex'or v. Eidson*, 9 Grat. 277.

15. If a bill does not state a case proper for relief in equity, the court

will dismiss it at the hearing, though no objection has been taken to the jurisdiction. *Hudson v. Kline*, 9 Grat. 379.

16. The whole facts of a case appearing from the records of other ended causes filed with the bill, the court may pass upon it upon a demurrer to the bill, without requiring the defendant to set out his defence in an answer. *Young's adm'r & Bowyer v. McClung et als.*, 9 Grat. 386.

17. A bill to marshal assets, or for their administration, should be in behalf of the plaintiff and all other creditors, and the heirs and devisees should be parties. But if the proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties unless a decree for an account has been made in another suit having the same object. *Stephenson v. Taverners*, 9 Grat. 398.

18. Though the proceeding under the statute, 1 R. C. 1819, ch. 96, § 20; Sup. R. C. ch. 149, § 2, for the sale of infants' lands, may be, and usually is, by bill, it is not necessarily so, but may be by petition or motion; and the parties being summoned, the evidence may be heard in court, and the necessary orders and proceedings may be made and had therein. *Parker et als. v. McCoy et als.*, 10 Grat. 594.

19. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue, but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust* and the plaintiff must prove his case as to both. *Johnson v. Zane's trustees et als.*, 11 Grat. 552.

### ANSWER.

1. C. files a bill against M., to which K. should have been made a party, but was not, and C. obtains a decree affecting the rights of K. K. then files a bill in the same court against C. to enjoin his decree. C. answers K's bill and by the bills and answers in the two suits, the respective claims of C. and K. are fully presented. The causes come on to be heard together in the court below and a decree is made from which there is an appeal. The appellate court will consider the bill of K. as an answer and cross-bill in the first cause and decide the case upon the merits, without sending the causes back for an answer of K. in the first suit. *Kyle's ex'or v. Kyle*, 1 Grat. 526.

2. A defendant in equity allowed to amend his answer in order to plead the statute of limitations, in bar of the plaintiffs claim. *White v. Turner's adm'r*, 2 Grat. 502.

3. A defendant, though in default for want of an answer, ought to be permitted to file any proper answer at any time before a final decree, but the trial of the cause is not to be thereby delayed, unless for good cause shewn. *Bowles v. Wilson*, 6 Grat. 78. *Beane et als. v. Simmons*, 9 Grat. 389.

4. A defendant in equity who is in default, files a demurrer to the bill, which is over-ruled; he is not entitled to two months in which to file his answer. *Reynolds v. The Bank of Virginia*, (vol. 6) 174.

5. Bill to enjoin judgment on a note charges fraud in the payee in procurement of the note, and that it was assigned to the holder, who recovered judgment thereon, but does not charge that the holder was an endorsee without value, or that he had notice of the fraud. The defendant says in his answer that he is a holder for value, without notice of the fraud, and states the consideration he gave for the note. These statements in the answer not being responsive to the bill must be proved. *Vathir v. Zane*, (vol. 6) 246.

6. Where the plaintiff comes into equity on the ground of discovery, the whole answer is to be read, if it is used at all, as the testimony of a witness; and no part of it, pertinent to the discovery, is to be rejected because it is affirmative matter in avoidance of that which is admitted to be true. But though the answer is to be read, it is subject to be discredited in the same manner as the testimony of any other witness. *Lyons v. Miller*, (vol. 6) 427.

7. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court and not a subject of appeal. *Craig v. Sebrell*, (vol. 9) 131.

8. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue; but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both. *Johnston v. Zane's trustees et als.* (vol. 11) 552.

## EVIDENCE.

1. Suits by a trustee and a *cestui que trust*, depending in the same court and against the same parties, for the recovery of the trust property, are not so connected that the testimony taken in the one may be read in the other. *Sheppards v. Turpin*, 3 Grat. 373.

2. Bill to enjoin judgment on a note, charges fraud in the payee in the procurement and that it was assigned to the holder who recovered judgment thereon, but does not charge that the holder was an endorser, without value or that he had notice of the fraud, the defendant says, in his answer, that he is a holder for value, without notice of the fraud and states the consideration he gave for the note. These statements in the answer not being responsive to the bill, must be proved. *Vathir v. Zane*, 6 Grat. 246.

3. In a bill by persons claiming to be legatees or assignees of legatees, against defendants as legatees, or assignees of legatees, under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption is, in the absence of all pleadings and proofs to the contrary,

that the persons made parties to the suit as legatees are not fictitious persons or mere pretenders to the characters assumed in the proceedings. *Ball et als. v. Johnson's ex'or et als.*, 8 Grat. 281.

4. In a bill by a party claiming to be a corporation, the defendant denies that the corporation has been regularly organized. If the plaintiff fails to prove it, the bill must be dismissed. *Bowyer's adm'r et als. v. The Giles, Fayette & Kanawha Turn. Co.*, 9 Grat. 109.

5. Upon a motion against a plaintiff in equity for security for costs, a bill of exceptions is taken to the opinion of the court, which states the evidence introduced on the motion. There is no objection to this mode of putting the evidence upon the record. *Evans v. Bradshaw et als.*, 10 Grat. 207.

### ISSUE OUT OF CHANCERY.

1. On a bill filed to enjoin a judgment on the ground that it was founded on a gaming debt, it being doubtful on the evidence whether such was the consideration, or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer by the concealment or misrepresentation of the debtor, the court should continue the injunction, and direct an issue to ascertain the facts. *Nelson's adm'r v. Armstrong et als.*, 5 Grat. 354.

2. Where the matter in controversy is of the nature of unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed. *Isler and wife v. Grove and wife*, 8 Grat. 257.

3. In a suit in equity if there be no conflict of testimony, no ambiguity or uncertainty, but a simple failure to prove material facts, it is improper to direct an issue. *Reed v. Cline's heirs*, 9 Grat. 136. *Wise v. Lamb*, *Id.* 294.

4. In such case if an issue is directed, and there is a verdict sustaining the charges in the bill, the decree should be for a dissolution of the injunction and a dismissal of the bill. *Id.* 294.

5. In a chancery cause, if upon the state of the proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it. And although the issue is found for the plaintiff, the bill should, notwithstanding, be dismissed at the hearing. *Smith's adm'r v. Betty et als.*, 11 Grat. 752. *Same v. Thurman et als.* *Id.*

6. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances, in support of the bill, it is error to direct an issue. The *onus* must be shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties before an issue should be ordered. *Ibid.*



## DECREES AND ORDERS.

1. A decree should not be made against the surety of a guardian until the account of the administratrix of the guardian is settled, and an enquiry is directed to ascertain whether any estate, real or personal, of the guardian remains. *Roberts v. Colvin*, 3 Grat. 358.

2. A court of equity can only decree upon the case made by the pleadings, though the evidence may show the plaintiff's right to a further decree. *Mundy v. Vawter et als.*, 3 Grat. 518.

3. A court of equity will decree over in favor of a purchaser of land, who has been deprived thereof, against his grantors, they being parties to the suit, and his right to relief arising upon the pleadings and proofs between the plaintiff and said purchaser and his grantors. And this, though he has a remedy at law upon the warranty in his deed. *Ibid.*

4. Though a defendant in equity has not appeared and filed his answer, and the bill has been taken for confessed, it is error to hear the cause and pronounce a final decree upon a commissioner's report which has not been returned to the court thirty days before the term at which the cause is heard. *Gray v. Dickinson's adm'rs*, 4 Grat. 87.

5. A slave having remained with the loanee more than five years, and after the death of the loanee having been taken possession of by the lender, creditors of the loanee levy executions on the slave in possession of the legatee of the lender, who enjoins the sale; upon the hearing the court may decree a sale of the slave to satisfy the executions; and a cross bill is not necessary. *Taylor v. Beale et als.*, 4 Grat. 93.

6. On a bill by heirs to recover the estate of their ancestor, their claim being sustained, and one of the heirs not having been heard from for 17 years, and being then an infant, her share was divided among the other heirs, upon their executing bonds to the judge and his successors in office to identify the party from whom the estate is recovered, against the claim of the absent heir. *Norman's ex'x v. Cunningham and wife et als.*, 5 Grat. 63.

7. A court of equity, at the suit of a judgment creditor, sets aside a sale by the debtor of personal property, as fraudulent and void, and directs the purchaser to deliver the property to a commissioner, who is directed to sell it. The purchaser fails to deliver the property to the commissioner, and then the court directs an account of its value, in order to subject the purchaser for the amount. This is proper practice. *McNew v. Smith*, 5 Grat. 84.

8. If a judgment debtor has conveyed away lands fraudulently, and retains other lands, the court, on setting aside the conveyance at the suit of the judgment creditor, should direct a sale of a moiety of the whole, em-

bracing in the moiety decreed to be sold the land retained by the debtor, and taking only so much of the land conveyed as will, with the land retained by the debtor, constitute a moiety of the aggregate of the whole. *Ibid.*

9. Land charged with an annuity will be decreed to be sold to satisfy the arrears, without noticing a *pendente lite* purchaser. *Philips et als. v. Williams, &c.*, 5 Grat. 259.

10. It is error to decree the sale of land for the payment of a debt, unless the creditor asking the sale shall shew that the land is legally chargeable in equity for such payment; and even then until the amount of the debt shall be ascertained. *Smith et als. v. Flint et als.*, 6 Grat. 40.

11. Where a bill to enjoin a sale of land states facts, which, if true, shew the land should not be sold, and is taken for confessed, it is error to decree a sale. *Ibid.*

12. Upon a decree to enforce a vendor's lien, the decree should give a day to the defendant to redeem by paying up the amount charged upon it. *Kyles v. Tait's adm'r*, 6 Grat. 44.

13. As a general rule, the decree in such case should direct a sale on a reasonable credit. *Ibid.*

14. Though a decree directing a sale of land does not direct the commissioners to convey to the purchaser, yet if they do convey, and they report the fact, and the court confirms the report, the decree of confirmation gives full effect to the deed, and relates back to the time of its date, so as to invest the purchaser with the legal title of the original owner of the land. *Evans and wife v. Spurgin*, 6 Grat. 107.

15. If the defendant was dead at the time of the decree, and there is notice of his death on the record, the decree cannot be impeached on that account in a collateral action. But the error must be shown in some proceeding by the proper parties to set aside the decree for this cause. *Ibid.*

16. A debtor having transferred bonds and conveyed his distributive interest in the personal and real estate of his father, to avoid payment of his debt, upon a bill to subject it, there should be an account of what the father died possessed of, in order to ascertain what portion the debtor is entitled to, and how he has disposed of it. *Greers v. Wright*, 6 Grat. 154.

17. The obligors in the bonds should be defendants, and the decree should be against them respectively for the amount due from each; if the same is still liable to satisfy the plaintiff's judgment. *Ibid.*

18. If the transferee of the bonds has received any part thereof, or has made himself liable for any by his improper acts or negligence, and the amount received from the obligors is not sufficient to satisfy the plaintiff's

judgment, there may be a decree against said transferee for the amount for which he is chargeable. *Ibid.*

19. The proceeds of the bonds should be first subjected, then the interest in the personal estate, and then the land. *Ibid.*

20. It is error to make a joint personal decree against the debtor and his transferee of the bonds, for the amount of the judgment. *Ibid.*

21. It is error to direct them to surrender the bonds to the sheriff. *Ibid.*

22. Upon a bill by creditors to enforce a deed of trust, where the trustees refuse to act, it is error simply to appoint trustees in the place of those who refuse to act. But the court should have the trust administered under its own supervision and control. *Reynolds v. Bank of Va. et als.*, 6 Grat. 174.

23. The prayer of the bill is for the appointment of trustees, and for general relief. The appointment of commissioners to sell and administer the trust under the control of the court, is authorized under either prayer. *Ibid.*

24. It is not necessary in the decree for the sale of the land, to direct that the guardian shall give security under the act 1 Rev. Code, ch. 108, p. 409-10. *Talley et als. v. Starke's adm'r et als.*, 6 Grat. 339.

25. A decree for the sale of infants' land, directs it to be sold upon the premises. It is irregular to make the sale elsewhere. The commissioner should report to the court that the sale could not be made there for want of bidders, and obtain instructions for his future action. *Ibid.*

26. The sale having been irregularly made, as the purchasers could not enforce their contracts if resisted by the parties in the cause, they should not be compelled to execute them. *Ibid.*

27. Though some of the purchasers are content to confirm the sale, yet as it is set aside as to others, the court will set it aside as to all, if the interests of the infants require it. *Ibid.*

28. A decree directs a sale of land, if a sum certain is not paid by a specified day. The clerk has no authority to issue an execution on this decree, without an order of the court or of the judge in vacation. *Shackleford v. Apperson*, 6 Grat. 451.

29. Though circumstances may exist which will warrant the court or the judge in vacation, to allow process of execution on such an interlocutory decree, these circumstances must be shown; and if they are not shown, it is improper to allow it. *Ibid.*

30. If an execution is issued by the clerk on such a decree, without au-

thority, the court may quash the execution in term, or the judge in vacation may restrain proceedings upon it by an injunction order. *Ibid.*

31. Under the circumstances of the case, it was error to dissolve the injunction before the cause was matured and came on for a final hearing. *Gray v. Overstreet et als.*, 7 Grat. 346.

32. Vendee of land enjoins the collection of the purchase money for a clear defect of title to part of the land. Vendor should be directed to perfect the title by a day specified by the court; and if he fails to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective. *Clarke v. Hardgrove, &c.*, 7 Grat. 399.

33. A legatee being dead, a decree for the distribution of the estate of his testator should be in favor of the personal representative of the legatee, and not of his distributee. *Luster v. Middlecoff et als.*, 8 Grat. 54.

34. In a suit to marshall assets, the court may, in its discretion, decree a sale of lands in the hands of the heirs, though some of them are infants. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

35. Though such a decree for a sale of land has been prematurely made, yet if the sale has been made and confirmed, the court will not set it aside on the application of the purchasers, if upon the hearing it appears that the sale is beneficial to the infants. *Ibid.*

36. The application of the purchasers in such a case to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money and have the sale set aside, the bill should be treated as a petition in the cause, and be brought to a hearing with it. *Ibid.*

37. The court having made a decree for a sale of real estate on the petition of the adult heirs, and with the assent of the creditor, it is erroneous to proceed to sequester the rents of the other real estate in the hands of the heirs, for the payment of debts, before deciding upon the claims of the purchasers to have the sale set aside. *Ibid.*

38. A judgment creditor comes into equity to set aside a deed of trust upon land as usurious. He fails to establish the usury; but the court having possession of the case, will decree the sale of the land, and the application of the proceeds, according to the priorities of the parties. *Martin v. Hall et als.*, 9 Grat. 8.

39. In a suit in which there is an absent defendant, the decree recites that the cause came on as to him, upon the bill, &c., and order of publica-

tion duly executed. This is conclusive that the order was duly made, published and posted. *Craig v. Sebrell*, 9 Grat. 131.

40. The decree referring to the record of another suit as an exhibit in the cause, makes it a part of the record, though it is not referred to in the bill or answer, nor made an exhibit by an entry on the order book. *Ibid.*

41. It is error to make a joint decree in favor of several persons, where one of them is an infant, though the decree is made with the consent of the next friend of the infant. *Armstrong's heirs v. Walkup et als.*, 9 Grat. 372.

42. If several suits are pending by different creditors, the court will order the proceedings in all but one to be stayed; and will require the several parties to come in under the decree in that suit, so that only one account of the estate may be taken. *Stephenson v. Taverners*, 9 Grat. 398.

43. A creditor who, with knowledge that there has been a decree for an account in another suit, brings a separate suit for his own claim, will be compelled to pay costs. *Ibid.*

44. A decree in one creditor's suit for an account, operates a suspension of all other pending suits of creditors; and they must come in under the decree. *Ibid.*

45. Where several creditors' suits are pending, the decree may be made in the cause first ready for a hearing, though it is not the first suit brought. *Ibid.*

46. To what errors in a decree consent extends. *Buchanan v. Clarke et als.*, 10 Grat. 164.

47. In a controversy between parties claiming under a judgment lien, and others claiming under a deed of trust, it being uncertain what part of the lands are embraced in the deed of trust, it is error to decree a sale of land until the priorities of the parties are adjusted, and it is ascertained what part of the lands are embraced in the deed. *Ibid.*

48. The judgment having priority, the land not included in the deed of trust should be first sold, and applied to the judgment, and if insufficient to discharge it, then the land included in the deed of trust should be sold, and so much of the proceeds thereof as with the proceeds of the land not conveyed, amount to a moiety of the proceeds of the lands, should be applied to the judgment. *Ibid.*

49. In a bill by purchaser of land for a rescission of the contract for failure by vendor to convey the land, there being a latent ambiguity in the contract of sale, which can only be cleared up by a survey, it is error to decree a rescission of the contract until a survey is made, and it is thus

ascertained whether the vendor can comply with his contract. *Purcell v. McCleary et als.*, 10 Grat. 246.

50. In the proceeding under the statute 1 Rev. Code, 1819, ch. 96, § 20, Sup. R. C. ch. 149, § 2, the order or decree of the court is conclusive upon the infant; and he has no day in court to show cause against it upon his coming of age. *Parker et als. v. McCoy et als.*, 10 Grat. 594.

51. Though the final decree gives the infant a day in court, this will not entitle him, as against a *bona fide* purchaser of the land, under the decree of the court, to disturb the sale. *Ibid.*

52. Bill by a joint purchaser of land for partition, claiming the larger portion of the land; though the plaintiff fails to make out his claim, yet the court may decree the partition according to the rights of the parties. *Jarrett v. Johnson*, 11 Grat. 327.

53. A vendor having but an equitable title, and only selling his interest in lands, without warranty, and authorizing the vendee to proceed to get in the legal title, it is not error to decree a specific execution of the contract, at the suit of the vendor, without directing a conveyance by him. *Bailey v. James*, 11 Grat. 468.

54. There is a bill by heirs against one of them in possession claiming title; and the court directs the plaintiffs to establish their title at law. If there are any equitable grounds to repel the statute of limitations, they should be stated in the bill; and the court in making the order for the trial of the title at law, should direct that the plaintiffs should have the benefit of this equity on the trial. *Caperton et als. v. Gregory et als. lessee*, 11 Grat. 505.

## RELIEF.

1. Though a bill is filed to stay a sale under a deed of trust on the ground of usury, until the obligee establishes his debt at law, and is framed with that object, disclaiming all call for discovery from the defendant, and all other relief in equity, if the court refuses to grant relief in the mode asked, yet if the facts disclosed show the plaintiff is entitled to relief upon equitable terms, the bill will not be dismissed, but the court will give him the relief to which he is entitled on principles of equity. *Bank of Washington v. Arthur et als.*, 3 Grat. 173.

2. A court of equity will appoint a commissioner to convey a legal title, outstanding in parties before the court, to the party having the equitable title, and entitled to the legal title. *Goodwin v. McCluer*, 3 Grat. 291.

3. A court of equity will enjoin a judgment on the ground of mistake of the jury, ascertained by after discovered evidence. But the subject of the action being accounts, the court will not direct a new trial at law, but

will refer the accounts to a commissioner, and will itself give the proper relief. *Rust et als. v. Ware*, 6 Grat. 50.

4. A creditor may come into equity to subject land in the hands of the donee of his debtor, though the decree against the debtor has not been revived against his administrator, and no execution has ever issued upon it. *Burbridge v. Higgins' adm'r*, 6 Grat. 119.

5. The general rule is, that when a party comes into equity for a discovery, the court will retain the cause, and give the proper relief founded on the discovery; unless where the discovery is sought to be used in a pending action at law. *Lyons v. Miller*, 6 Grat. 427.

6. The obligors in a forfeited forthcoming bond being insolvent, a court of equity having jurisdiction of the subject, will treat the bond as a nullity, though it has not been quashed, and proceed to give the proper relief. *Jones, &c. v. Myrick's ex'ors*, 8 Grat. 179.

7. Creditors at whose suit the debtor has taken the insolvent debtor's oath, come into equity to set aside a deed for fraud on its face, and because the beneficiary in the deed had committed a fraud on them in professing to sign it for the benefit of all, and yet claiming the exclusive benefit of it. Though the court think the deed valid, yet being satisfied that the signing creditor signed for all, the court will give all the benefit of the deed, and distribute the fund in the creditor's suit. *Phippen v. Durham et als.*, 8 Grat. 457.

8. In an injunction to a judgment at law against the assignor and assignee, the plaintiff not being entitled to enjoin against the assignee, but entitled to have payment against the assignor, is not entitled to a decree against him for payment, but upon the terms of releasing him from his liability as assignor. *Drake v. Lyons*, 9 Grat. 54.

9. On a bill by a creditor to set aside a voluntary conveyance, it appearing in the progress of the cause, that the grantor had other lands which may be applicable to pay this debt, an enquiry in relation to them should be directed before setting aside the deed. *Fones v. Rice et als.*, 9 Grat. 568.

10. By the act, Code, ch. 124, § 1, p. 526, a court of equity may decide upon the title in suits for partition; and this, though the suit was commenced before the act was passed; and after allowing a reasonable time to the parties for trial, should proceed to decide the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts, either by a jury or otherwise, as may be most proper. *Currin et als. v. Spraul et als.*, 10 Grat. 145.

11. A creditor qualifies as administrator on his debtor's estate, and after exhausting the personal assets in payment of debts is still a creditor. In

a suit by the heirs in a county court the land is sold; and the administrator files a bill in the circuit court to enjoin the payment of the purchase money to the heirs, and asks to have it applied to his debt. **Held:** 1st. He is entitled to have the proceeds of the land applied to pay his debt. 2nd. The injunction should only go to restrain the payment of the purchase money to the heirs; and should not restrain the collection of it by the county court. 3rd. Though it would have been more regular for the administrator to connect himself, by petition or bill, with the proceedings in the county court, in which the fund had been realized, yet there is no serious objection to the mode adopted by him. The county court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as the circuit court may appoint to receive it: or one of the suits may be removed to the court in which the other is pending. *Williams v. Williams et als.*, 11 Grat. 95.

### IN APPELLATE COURT.

1. The appellate court will reverse a decree and send the case back, with leave to plaintiff to amend his bill and make new parties, when he has shewn himself entitled to relief on the merits. *Jameson's adm'r v. Deshields*, 3 Grat. 4.

2. To prevent surprise upon the plaintiff, the appellate court, while it reverses a decree rendered in favour of the plaintiff, will send the cause back, to give him an opportunity to make out his case. *Piper v. Douglass' ex'or*, 3 Grat. 371.

3. In a suit by an administrator *de bonis non* against the administrator of the first administrator, for a settlement of the first administrator's account, it is irregular to decree payment to the administrator *de bonis non*; but the distributees being parties and not objecting, the decree will protect the defendant, and therefore the error is no ground of reversal of the decree in the appellate court. *T. Morris' adm'r v. S. Morris' adm'r et als.*, 4 Grat. 293.

4. A commissioner's report purporting to be made in obedience to an order of the court, and the court having made the report the basis of its decree, and there not appearing to have been any question of the commissioner's authority in the the court below, the appellate court must presume that it was made by proper authority, though no order of account is in the record. *Wills' adm'r v. Dunn's adm'r*, 5 Grat. 384.

5. Where there is a sale of the defendant's land, in a suit by a plaintiff claiming to be a corporation, which is not proved to have been organized, that fact being in issue, under a decree in the cause, and there being a final decree directing the purchaser to pay the money to the plaintiff, the defendant appeals. The court of appeals will reverse so much of the decree as directs the purchase money to be paid to the plaintiff, and remand the cause with directions to have the purchase money collected and paid to the defendant below, and then dismiss the bill at the costs of the plaintiff. *Bowyer's adm'r et als. v. The Giles, Fayette & Kan'ha Turnpike Co.*, 9 Grat. 109.



## OTHER MATTERS.

1. Where there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court to subject it, the appointment of a receiver, in one of the suits, will enure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. *Beverley v. Brooke et als.*, 4 Grat. 187. *Same v. Scott et als.* *Id.*

2. The parties in both suits being substantially the same, the successful plaintiff may have an order, in his own suit for the settlement of the receivers accounts and a decree against him for the amount found to be in his hands. *Ibid.*

3. What delays in a chancery cause will not amount to an abandonment of the cause or deprive the party of his right to revive and prosecute it. *Chinn et als. v. Murray et als.*, 4 Grat. 348.

4. The value of land for which an agent is held to account to his principal may be ascertained by a jury or a commissioner, as the parties may elect, or if they do not elect, as the court may direct. *Wellford et als. v. Chancellor*, 5 Grat. 39.

5. Bill by a party having a life estate in slaves to enjoin removal of the slaves from the State, by party in possession claiming them. The plaintiff dies. The remainderman may then file his bill in the same court, for the same purpose. *Robinson's ex'ors v. Day*, 5 Grat. 56.

6. A cause is ready for a decision, as to the substantial parties at a regular term of the court. At a following intermediate term, the plaintiff amends his bill to make a formal party, who comes in and answers at the same term and consents that the cause may be then heard. The court may hear the cause at the intermediate term, though it is objected to by a substantial party, as to whom it was ready at the preceding regular term. *Ibid.*

7. Money paid under an execution on a decree which is afterwards reversed and the bill dismissed, may be recovered back by motion to the court on notice. *Flemmings v. Riddick's ex'ors*, 5 Grat. 272.

8. Upon a motion to dissolve an injunction before answer, all the allegations of the bill must be taken as true. *Peatross v. McLaughlin*, 6 Grat. 64. *McClellan v. Kinnaird*, *Id.* 352

9. In a suit for the sale of infants' lands a guardian *ad litem* may be appointed at rules. *Talley et als. v. Stark's adm'x et als.*, 6 Grat. 339.

10. The court will recommit an account to a commissioner, with directions to inquire what items of it originated in a partnership for gambling, though the pleadings state nothing about such a partnership. *Watson v. Fletcher* 7 Grat. 1. *Fletcher v. Watson*, *id.*

11. When a court of equity will control and direct an administrator, in the administration of an estate, who has come into equity to set up his claims against it. *Ibid.*

12. Pending a bill for an injunction to a judgment and for the rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages and with costs to the plaintiff. *Young's adm'r and Bowyer v. M'Clung et als.*, 9 Grat. 336.

13. The disregard by the circuit court of a rule adopted by itself for the regulation of the practice therein, is not a ground of appeal. *Hudson v. Kline*, 9 Grat. 379.

14. In a suit by distributees against an administrator, the accounts having been referred, a report is returned before the defendant's evidence is filed. He excepts to the report, and files an affidavit, showing a sufficient excuse, for not sooner taking his evidence, and asks for a recommittal of the report. Under the circumstances, though the testimony may sustain the defendant as to the subject of controversy, it would not be proper to dismiss the bill. But the plaintiff should have an opportunity to disprove the testimony, and is also entitled to an account of administration. The report should be recommitted. *Thomas v. Dawson and wife*, 9 Grat. 531.

15. Neither the bill, nor the answer referring to the wife of the intestate, and there being no proof that she is alive, the appellate court will presume she is dead. *Ibid.*

16. A commissioner's report made in a cause had been returned for more than six years and no exception taken to it until the opinion was pronounced, and then it was excepted to for want of notice. The exception was properly overruled. *Miller v. Holcombe's ex'or et als.*, 9 Grat. 665.

17. When a court will not presume a conveyance of property. *Roberts v. King*, 10 Grat. 184.

18. When questions are raised by the pleadings and proofs, an exception to a commissioner's report is unnecessary to raise them for adjudication. *French v. Townes et als.*, 10 Grat. 513.

19. Under the act 1 R. C., 1819, ch. 96, § 20, Sup. to R. C. ch. 149, § 2, it is not necessary to summon the infant owners in a proceeding to sell their land; but the court may appoint a guardian *ad litem* to defend them. *Parker et als. v. M'Coy et als.*, 10 Grat. 594.

20. An objection to the jurisdiction of the court in the case of an in-

junction to an execution, may be taken at the hearing of the cause. *Beckley v. Palmer et als.*, 11 Grat. 625.

SEE ABSENT DEFENDANTS, COMMISSIONERS, CO-DEFENDANTS, INJUNCTIONS, PARTIES, and EQUITABLE JURISDICTION AND RELIEF.

---

### PRACTICE IN CRIMINAL CASES.

1. Neither the Commonwealth nor the accused have the right to demur to the evidence in a criminal prosecution, except with the consent of the other party. *Doss' case*, 1 Grat. 557.

2. The court refusing to compel the attorney for the commonwealth to join in a demurrer to evidence, tendered by the defendant, is not required, *ex officio*, to direct the jury to find a special verdict. *Ibid.*

3. Though on a criminal trial, the accused offers no evidence, the attorney for the commonwealth is entitled to open and conclude the argument before the jury. *Ibid.*

4. A jury having convicted the prisoner and fixed the term of his imprisonment at a shorter period than the law allows: if the error is found out before the jury are discharged, they should be sent back with proper instructions, to reconsider the verdict. If they persist in the finding or are discharged before the error is discovered, the court should direct a *venire de novo*. *Nemo's case*, 2 Grat. 558.

5. Upon an indictment for felony, the prisoner pleads in abatement that one of the grand jurors, who found the indictment against him, was at the time a surveyor of a highway, and the attorney for the commonwealth takes issue upon the plea. It should be tried by a jury. *Day's case*, 2 Grat. 562.

6. When there is a variance between the presentment and information, it may be availed of, either as cause against filing the information, or by motion to quash it. *Jones' case*, 2 Grat. 555.

7. On a trial for felony, the court has no authority to discharge the jury, without the consent of the prisoner, merely because the court is of opinion that the jury will not be able to agree. *Williams' case*, 2 Grat. 567.

8. The practice of finally adjourning the court, without noticing the jury, whereby it is discharged by operation of law or of discharging them, simultaneously with the final adjournment of the court, approved. *Ibid.*

9. The court, before admitting dying declarations, should ascertain whether the deceased expected to die, before the declarations were made. *Hill's case*, 2 Grat. 594.

10. Where several persons are proceeded against jointly for a felony, before the examining court, and are sent on for trial to the superior court, the clerk of the county court should issue a separate *venire facias* for summoning a *venire* for the trial of each of them separately. *McWhirt's case*, 3 Grat. 594.

11. If in such a case the clerk of the county court has issued but one *venire facias*, and the prisoner elect to be tried separately in the superior court, it is proper for the court to quash the panel summoned under the *venire facias* issued by the clerk of the county court, and to direct a separate *venire facias* for summoning a *venire* for the trial of each of them separately, at the same term of the court. *Ibid.*

12. A prisoner being sentenced by the court before which he was tried, to confinement in the penitentiary for a less time than is authorized by law, for the offence of which he was convicted, the circuit court of *Henrico*, and the city of *Richmond* may, upon the proper proceedings had before that court, correct the error, and sentence him for the shortest period fixed by the statute for his offence. *Logan's case*, 5 Grat. 692.

13. Though at the time the felony charged was committed, and at the time of the arrest of the prisoner, the law in relation to called courts was unrepealed, yet if before the commitment the act abolishing called courts had gone into effect, it was proper for the committing justice to send the prisoner to be tried according to the new law. *Ewing's case*, 5 Grat. 701.

14. In arraigning the prisoner on his trial before the circuit court, it was proper to charge the jury under the law which was in force when the offence was committed. *Ibid.*

15. Upon a question addressed to the court, the judge is not bound to hear an argument from the prisoner's counsel, if his opinion is already formed. *Howell's case*, 5 Grat. 665.

16. In a criminal trial, the prosecutor may employ counsel to aid the attorney for the commonwealth, and such counsel will be permitted to aid in the prosecution, *Hopper, Stiers & Lemmon's case*, 6 Grat. 684.

17. Upon indictment for perjury where it is a question whether the oath taken is legal perjury, the court should not entertain a motion to quash the indictment, but should put the defendant to his demurrer. *Liton's case*, 6 Grat. 691.

18. Motions to quash indictments or informations are not to be encouraged or extended. *Lodge's case*, 6 Grat. 699.

19. On an information for perjury, the attorney for the commonwealth will be allowed to amend the information in accordance with the presentment on which it was founded, after the appearance of the defendant and a motion by him to quash it. *Ibid.*

20. A prisoner being sent on for further trial from a hustings court, the *venire facias* is properly executed by the sergeant of the corporation. *Smith's case*, 6 Grat. 696.

21. The act, Code 1849, ch. 208, § 34, p. 778, authorizes a prisoner, who is tried on an indictment containing several counts, some of which are faulty, to move the court to instruct the jury to disregard the faulty counts. A motion to exclude evidence, which could only be applicable to the faulty count, is in effect a motion to disregard that count. *Rand's case*, 9 Grat. 738.

SEE CRIMINAL JURISPRUDENCE AND PROCEEDINGS.

---

## PRESENTMENTS.

SEE INDICTMENTS, &c.

---

## PRINCIPAL AND AGENT.

1. An agent authorized to purchase land for his principal, purchases in his own name, and takes a conveyance to himself. He is bound to convey the land to his principal, upon his complying with the terms of his contract of purchase, in the same plight and condition in which the same was conveyed to him. *Wellford et als. v. Chancellor*, 5 Grat. 39.

2. If the agent has disposed of a part of the land purchased, so that the principal cannot obtain that part, the agent will be held to account for the same, at its true value, at the time when it should have been conveyed to his principal, to be ascertained by a jury or a commissioner, as the parties may elect, or as the court, on their failure to do so, may direct. *Ibid.*

3. It is competent for a principal and agent to compromise a controversy between them and such compromise, if fairly made with a full knowledge of all the facts, and where no undue influence is exerted, or improper advantage of the situation of the principal is taken, is binding on the principal, though he may by such compromise yield a portion of his rights. But if the agent misrepresents a material fact, the compromise will be vacated; and this especially where advantage is taken of the circumstances of the principal. *Ibid.*

4. An agent who transfers a negotiable note for value, though not a guarantor of the solvency of the parties to the note, is a guarantor of the genuineness of the instrument, unless he discloses not only his agency, but the name of the principal for whom he is acting. *Lyons v. Miller*, 6 Grat. 427.

5. The president of a corporation is not *ex officio* the agent of the corporation to sell property, which it may direct to be sold; and unless appointed to sell, his representations are not binding on the corporation. *Crump v. United States Mining Co.*, 7 Grat. 352.

6. An agent to sell property, is furnished by his principals with written proposals containing the terms of sale and a description of the property. If the agent makes other representations of the value and condition of the property which are false, and thus induces persons to buy, the principals, though they neither authorized or were informed of these representations, are bound by them and the contracts are void. *Ibid.*

7. In an action of debt in which the defence is payment and set off, the transactions having been principally with a brother of plaintiff's intestate, after the introduction of evidence tending to prove the agency, the record of a suit instituted by the defendant's intestate against the plaintiff's intestate, was held competent evidence to prove the agency of the brother; and a paper signed by the brother, showing that he had settled the price of certain tobacco, for the plaintiff's intestate with the defendant's intestate, was held competent evidence for the same purpose. *Perkins' adm'r v. Hawkins' adm'r*, 9 Grat. 649.

8. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal. And an endorsement of a bill by the agent in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal. *Stainback v. The Bank of Va.*, 11 Grat. 269. *Stainback v. Read & Co.*, *Id.* 281.

9. A party dealing with the agent with knowledge, or means of knowledge, that under such a power he is endorsing the name of his principal for his own benefit, is not entitled to recover from the principal. *Ibid.*

10. The facts that the attorney, who was the drawee of a bill upon which he endorses the name of his principal, held the bill at the time it was discounted by the holder, and the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal. *Ibid.*

11. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal. *Stainback v. Read & Co.*, 11 Grat. 281.

12. Such a power does not authorize the attorney to draw a bill in the name of his principal for the benefit of the attorney; and a party dealing with the attorney, and having the means of knowing that the agent was

exceeding his powers in thus drawing the bill for his benefit, cannot recover of the principal. *Ibid.*

13. Declarations of a person who had been the agent in procuring a deed for another, made either before the negotiations for the deed commenced, or after the execution of the deed was completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed, had been fraudulently omitted. *Smith's adm'r v. Betty and others*, 11 Grat. 752. *Same v. Thurman and others. Id.*

14. But acts and declarations of such persons done or made whilst the negotiations was pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. *Ibid.*

---

## PRINCIPAL AND SURETY.

SEE SURETY.

---

## PRISON BOUNDS.

1. There is a joint judgment against two, who have been arrested and committed to prison. They may jointly execute a prison bounds bond. *McGuire et als. v. Pierce, assignee, &c.*, 9 Grat. 167.

2. It is no defence to an action on a prison bounds bond that the prisoner, after a departure, voluntarily returned to the rules, and there remained, &c., or that he voluntarily returned to the jail, &c., or that the jailor made fresh pursuit after the prisoner and re-captured him and committed him to jail, or that the prisoner accidentally walked sixteen feet beyond the limits of the prison bounds, which were bounded by an imaginary line, and thereupon immediately returned, &c. *Ibid.*

3. An endorsement of the name of the sheriff on the bond, before action brought, is a sufficient assignment thereof; and the action may be maintained by the creditor as assignee, without writing out the assignment, or the assignment may be written out in the progress of the trial, after the jury are sworn. *Ibid.*

4. The boundaries of the prison rules being recorded in the order book of the county court in the order of the court establishing them, is a sufficient compliance with the statute requiring said boundaries to be recorded. *Ibid.*

5. The measure of damages in an action on a prison bounds bond is the debt, interest and costs. *Ibid.*

## PRIVILEGE.

1. The act, 1 Rev. Code, ch. 51, § 31, does not privilege members of the General Assembly, during the period therein prescribed, from the issuing of process against them, but from the service of such process upon their persons, servants or estate. *M'Pherson v. Nesmith and wife*, 3 Grat. 237.

2. If process has issued before the commencement of the privilege, all further proceedings thereon are to be suspended until the termination of the privilege, without abatement or discontinuance. *Ibid.*

3. If such privilege is violated, the exercise of the party of his right to claim redress, is not confined to the period of its existence. *Ibid.*

4. Where a suit has been brought against a member of the General Assembly, and the process has been served upon him, and an office judgment entered up against him at the rules, and confirmed whilst his privilege existed, he may at the next term of the court, though his privilege has then ceased, upon motion, have all the proceedings subsequent to the issue of the process set aside and the cause remanded to the rules. *Ibid.*

## • PRIVY EXAMINATION.

*Quære*: If the certificate of the privy examination of a *feme covert*, made under the act of 1792, which purports, in the body of the certificate to be under the seals of the justices, but in fact no seals or scrolls are affixed to their names, is valid to bar the *feme*. *Bryan v. Stump, &c.*, 8 Grat. 241.

## PROCESS.

A writ which purports to be a *pluries capias*, but is without date, and is not attested by the clerk, is wholly null and void, and all proceedings based thereon are illegal. *Hickam v. Larkey*, 6 Grat. 210.

SEE ATTACHMENTS, HABEAS CORPUS, EXECUTIONS, SCIRE FACIAS, AND WRIT OF ERROR.

## PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. order to pay money to B, out of a fund due to the drawer for work done is not a negotiable instrument, for the non-acceptance or non-payment of which an endorsee is entitled to notice. *Pitman v. Breckenridge & Crawford*, 3 Grat. 127.



2. The maker of a note for the accommodation of the payee is not released by the failure to protest the note and give him notice, though it was known to the holder that he was an accommodation maker of the note. *Hansbrough v. Gray*, 3 Grat. 356.

3. In such case the maker of the note is not discharged by the omission of the holder to enforce the collection thereof until the payee for whose accommodation the note was made, became insolvent; though the holder had looked to the payee for payment. *Ibid.*

4. A note is given for the amount of an account due, and the note is discounted for the payee; his remedy on the account is suspended until the note is dishonored. *M'Cluney & Co. v. Jackson*, 6 Grat. 96.

5. The maker of a negotiable note proving fraud in the procurement of the note by the payee, the holder to enable himself to recover, must prove he is a *bona fide* holder for value. *Vathir v. Zane*, 6 Grat. 246.

6. The transferrer for value of a negotiable note, though not a guarantor of the solvency of the parties to the note, is a guarantor for the genuineness of the instrument. *Lyons v. Miller*, 6 Grat. 427.

7. Nor is it material whether the person making the transfer receives the consideration to his own use, or for the another; unless he is acting as agent, and discloses not only his agency, but the name of the principal for whom he is acting. *Ibid.*

8. A paper signed in blank, and endorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who endorsed it in blank will be liable on his endorsement to a holder for value. *Orrick v. Colston*, 7 Grat. 189.

9. In such a case if the paper is filled up as a common promissory note a third person who advances the money for it to the makers, he may treat the endorser as an original surety or as a guarantor of the note. *Ibid.*

10. If after the note is filled up and delivered to the payee, the holder fills up the blank endorsement with a guarantee, he may afterwards erase it and proceed against the endorser as an original surety. *Ibid.*

11. The maker of a note becomes the bail of the holder, and they enter into a covenant by which the maker is to hold the note until his liability as bail ceases, and then to return it. The note is not merged in the covenant. *Bowles' ex'or v. Elmore's adm'r* 7 Grat. 385.

12. In an action on a bill of exchange by the holder against an endorser, where it is proper to send the notice of protest by mail, and it has not arrived at as early a day as in the regular course of the mail, it might have come, if started at the proper time, the *onus* is upon the plaintiff to prove

that it was put into the mail at the proper time. *Friend v. Wilkinson & Hunt*, 9 Grat. 31.

13. A bill of exchange having fallen due and been protested before the act allowing three *per cent* damages and interest upon the cost of protest went into operation, such damages and interest are not recoverable thereon. *Ibid.*

14. A promissory note is signed R. H. E., [for S. H. E.,] the latter being in brackets. Upon the face of the paper it is the note of R. H. E. *Early v. Wilkinson & Hunt*, 9 Grat. 68.

15. Parol evidence is admissible to prove the note was intended to be the note of R. H. E. *Ibid.*

16. If the parol evidence was improper, yet as the court had instructed the jury that the note was on its face, the note of R. H. E., the admission of the evidence could not be injurious to R. H. E., and it is therefore no ground for reversing the judgment. *Ibid.*

17. A note for a sum certain, payable to order, and negotiable and payable at a bank out of the State of Virginia, is a note negotiable at a bank in Virginia, and is put upon the same footing as bills of exchange, with the like remedy for the recovery thereof, against the maker and endorsers jointly, and the like effect, except as to damages. *Hays v. Northwestern Bank of Va.*, 9 Grat. 127.

18. In such a case demand and notice of protest for non-payment is not necessary to subject the maker of the note. *Ibid.*

19. In debt on a note signed with a partnership name, the declaration charges that the defendants by their partnership name subscribed the note; and there was no affidavit by the defendants or any one of them, putting the execution of the note in issue. They are precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the partners. *Phaup, &c. v. Stratton*, 9 Grat., 615.

20. In an action on a note in which it is averred that the endorser endorsed it by signing his name, &c., without an affidavit filed with his plea, he cannot question the genuineness of his signature, or show that the note had been altered after he endorsed it. *Archer v. Ward*, 9 Grat., 622.

21. The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting house of the drawee, and there exhibited it to a clerk of the drawee and demanded acceptance thereof, and that the said clerk replied that the same could not be accepted. The protest is sufficient to bind the endorser. *Stainback v. The Bank of Va.*, 11 Grat., 260.

22. Parol evidence that the clerk was authorized to refuse acceptance of a bill, is admissible in an action by the holder against the endorser. *Ibid.*

23. A note made in a particular country is to be deemed a note governed by the laws of that country, whether it is payable there, or it is payable generally, without naming any particular place. *Wilson v. Lazier et als.* 11 Grat., 477.

24. The possession of a negotiable instrument is *prima facie* evidence that the holder took it for value, and that he came to it honestly. *Ibid.*

25. A total failure of the consideration of a negotiable note does not impose on the innocent holder the *onus* of proving that he gave value for it. *Ibid.*

26. If the evidence raises a suspicion of fraud in the procurement of the note, then the holder is bound to prove that he gave value for it. *Ibid.*

27. There having been a total failure of consideration of a negotiable note, and the payee having endorsed it as a gift to a third person, who endorsed it for value: though the maker is compelled to pay it to the holder for value, he is entitled to recover from the payee, and if he is unable to pay it, from the endorser, the amount he received for it: And upon a bill against all the parties he will be relieved. *Ibid.*

28. A note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a cotemporaneous origin. *Johnston v. Zane's trustees et als.* 11 Grat., 552.

29. A bill drawn in Petersburg, Virginia, on a house in London, was protested for non-acceptance, on the 5th of April, 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th of that month, and notice of the dishonor of the bill was sent by that steamer. At that time these steamers carried the mail between the two countries under a contract with the British Government; and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London post-office, and such packets sailed from London or Liverpool on the 7th, 10th and 17th of April, 1843. But it was probable the steamer of the 19th would arrive before any of them. **HELD:** The notice was sufficient. *Stainback v. The Bank of Virginia*, 11 Grat., 260.

---

## PUBLIC LANDINGS.

1. The viewers report that a public landing at the place viewed would be of very great convenience to the public, as a list of persons, all heads of families, to the number of one hundred and twenty, had been shown to them; all of whom, as well as many others would be benefitted by the proposed landing. **HELD:** It was no error in the report that this list of persons was not returned with the report. *Muire v. Falconer et als.* 10. Grat., 12.

2. Two of the persons on the list were justices of the peace of the county; and when the order awarding the writ of *ad quod damnum* was made they were on the bench, and one of them was on the bench when the landing was established. This was no legal objection. *Ibid.*

3. There is no time fixed by the statute for which notice shall be given to a party, upon whose land a public landing is sought to be established. If, therefore, the notice is served upon him at any time before the end of the return day of the notice, it is sufficient in law, and he must show that it was insufficient and not reasonable notice. *Ibid.*

4. The statute does not require the writ of *ad quod damnum* to be returned to the next court after it is awarded: And if the order awarding it so directs, the direction is merely directory to the officer, and his failure to make the return within the time prescribed will not affect the validity of the inquest properly taken. *Ibid.*

5. A jury of inquest upon a writ of *ad quod damnum* to establish a public landing, is charged according to the act 2 Rev. Code, p. 238, § 15, but is not charged according to the act of January 30th, 1834, Sess. Acts 97. This is not error, the provisions of this last act having no application to public landings. *Ibid.*

6. The application is to establish a landing at a certain place, which is in fact on the lands of two adjoining proprietors; and the precise locality of the dividing line between them is a matter of controversy, though the line had been previously fixed by the processioners. The land being open and uncultivated, it was proper for the jury in assessing the damages to each, to take the line fixed by the processioners as the true line. *Ibid.*

7. With the consent of the party to whom the damages were assessed, the county court directed that the damages so assessed to him, should be withheld until the dispute about the dividing line should be determined; and that the damages should then be paid to the party to whom it appeared the land belonged. This is no error. *Ibid.*

8. In the absence of evidence clearly showing that the damages assessed are insufficient, the inquest taken on the ground must be deemed conclusive on the question. *Ibid.*

9. Upon an application to establish a public landing, if no motion has been made in the county court to quash the report of the viewers, it is too late to object to it in the appellate court. *Ibid.*

10. In such case the party opposed to the establishment of the landing, having made himself a party in the cause, and taken an appeal, upon which all the proceedings subsequent to the report of the viewers were quashed; and it being proved that after the cause went back, he was served with notice, and he having appeared and opposed the establishment of the landing, without objecting to the sufficiency of the notice, he cannot object to it in the appellate court. *Ibid.*

## PUBLIC PLACE.

1. What is not a public place, in contemplation of the act to suppress gaming. *Vandine's Case*, 6 Grat. 689.

2. A storehouse in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming. *Feazle's Case*, 8 Grat. 585.

## PUBLIC SCHOOLS.

The first section of the act passed March 5th, 1846, entitled "an act for the establishment of a district public school system," only requires two thirds of the legal voters, of a county, who shall vote, to authorize the act to be carried into execution. *Literary Fund v. Dalby*, 4 Grat., 528.

## PURCHASERS.

1. A Court of Equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties for error in the decree, or the proceedings under it, when the report of the commissioner has been confirmed. *Worsham v. Hardaway's administrator*, 5 Grat., 60.

2. Land on which an annuity is charged, having been sold pending a suit, to recover the arrears of the annuity, it will be directed to be sold to satisfy the arrears of the annuity, without noticing the *pendente lite* purchaser. *Phillips et als. v. Williams*, 5 Grat., 259.

## RAPE.

1. Though in a prosecution for rape, it is competent to prove the fact of a recent complaint by the female, for the purpose of sustaining her credit, it is not competent to prove any particulars of the description of the person committing the offence, which may have been given by her. *Brogy's case*, 10 Grat. 722.

2. If the female, when examined as a witness, declines giving a description of the person committing the offence, it is not competent to prove the description given by her when not upon oath. *Ibid.*

## RECEIVER.

1. When there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court to subject it, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will enure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. *Beverley v. Brooks et als.*, 4 Grat. 187. *Same v. Scott et als.* *Id.*

2. The parties in both suits being substantially the same, the successful plaintiff may have an order in his own suit for the settlement of the receiver's accounts, and a decree against him for the amount found to be in his hands. *Ibid.*

3. The law in relation to the appointment, duties, and responsibilities of receivers, investigated. *Ibid.*

## RECITALS.

1. Recitals in a marriage settlement shall not control the trust plainly expressed in the instrument. *Whiting v. Rust*, 1 Grat. 483.

2. Recitals in a deed are evidence against the granter and all claiming under him, but not against a third person, claiming not under but against the deed. *Wiley et als., v. Givens et als.*, 6 Grat. 277.

3. Recitals in a deed are evidence against parties and privies in blood; in estate and in law. *Ibid.*

4. The recitals in a deed of a commissioner of delinquent lands are not evidence against a party claiming adversely to the deed. *Walton v. Hale*, 9 Grat. 194.

5. On a motion by administratrix of high sheriff, against a deputy and his sureties, for failure to pay over money, the judgment against the high sheriff and its recitals are evidence against the deputy and his sureties. *Cox et als., v. Thomas' adm'r*, 9 Grat. 323.

## RECOGNIZANCE.

1. A justice can only take the recognizance of bail, after the examining court has decided that the prisoner is bailable and fixed the amount of bail. *Hamlett et als. v. Commonwealth*, 3 Grat. 82. *Saunders' adm'r v. Commonwealth.* *Id.* 214.

2. The recognizance of bail taken by a justice of a prisoner sent on for trial by the examining court, must show on its face that the examining

court had entered of record that the prisoner was bailable, and had fixed the amount in which the bail should be taken. *Ibid.*

3. A county court has authority to require a party to enter into a recognizance to keep the peace; at least where the proceeding was commenced before the act of 1848, Sess. Acts, ch. 14: *Welling's case*, 6 Grat. 670.

4. When a recognizance has a condition to do some act, for the doing of which an obligation may be properly taken, and the court or officer taking it had authority of law to act in cases of that general description, the recognizance is valid though it does not recite the special circumstances under which it is taken. And in declaring upon such a recognizance, it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it. *Archer v. The Commonwealth*, 10 Grat. 627.

5. When by law separate terms of a circuit court are appointed for the trial of civil and criminal causes, a recognizance in a criminal case is properly made returnable to a term for the trial of criminal causes, and a *scire facias* thereon is properly made returnable to the term for the trial of civil cases or to the rules, the first being a criminal, and the other a civil proceeding. *Ibid.*

---

## RECORDS.

1. A decree directing a conveyance of land by the marshal, is not of itself competent evidence of the marshal's authority to convey the land embraced in his deed, unless it designates the land directed to be conveyed; but the whole record, or so much as will show the land intended by the decree, must be produced with it. *Masters v. Varner's ex'ors*, 5 Grat. 108.

2. A decree of partition being a necessary link in a chain of title, if the decree sufficiently designates the land referred to in it, it is competent evidence without the production of the whole record. *Wynn v. Harman's devisees*, 5 Grat. 157.

3. Upon a motion to quash a writ and inquisition founded on a judgment at law, which motion is sustained, the writ and inquisition is a part of the record, though no bill of exceptions is taken, and will be so treated by an appellate court. *Wallop's adm'r v. Scarborough et als.*, 5 Grat. 1.

4. The official bond of a committee of a lunatic, given in obedience to the order of the court, and its execution certified on the record, is a part of the record, and may be looked to to ascertain what kind of bond the court required to be executed. *Beery v. Harman's Committee*, 8 Grat. 48.

5. A record to which neither the demandants nor tenants were parties, is not even *prima facie* evidence against the tenant, that the grantor in the

deed to the demandants was heir at law of the grantee in the patent under which the demandants claim title. *Duncan v. Helms et als.*, 8 Grat. 68.

6. A record of another suit between the same parties, in which the same causes of action were in controversy, and the finding of the jury was against them, is competent evidence. *Johnson's ex'x v. Jennings' adm'r*, 10 Grat. 1.

7. In ejectment, plaintiff claims under a deed from the commissioner of delinquent lands; the record of the proceedings, including the exhibits in which the sale and conveyance of the land was directed, is competent evidence, though there be irregularities in the proceedings, apparent on the face of the record. *Smith et al. v. Chapman*, 10 Grat. 445.

8. In detinue for slaves by a trustee in a deed of trust against a defendant who claims the slaves by purchase from the same grantor, the defendant offers a witness to prove the debt secured by the deed was paid by a sale of slaves to the creditor by the debtor. To this evidence the plaintiff objects, and introduces a record in a chancery cause between the debtor and creditor, in which it has been decided that the price of these slaves has been by agreement between the debtor and creditor applied in part discharge of another debt. **HELD:** The decree is conclusive, and the defendant's evidence is inadmissible. *Nichols v. Campbell*, 10 Grat. 560.

9. A cause is brought on to be heard upon the bill, answer, exhibits, and awards: *quære*: if the depositions and commissioner's report are a part of the record, and evidence as such in a case in which the record is evidence? *Nelson's adm'r v. Cornwell*, 11 Grat. 724.

---

## REGISTRY OF DEEDS.

1. The registry of a deed which conveys land by general description, such as "all my estate real and personal" is not notice in law to a subsequent purchaser of the grantor, of the existence of the deed. *Mundy v. Vawter et als.*, 3 Grat. 518.

2. A power of attorney for the conveyance of lands, falls within both the letter and spirit of the act regulating conveyances, 1 Rev. Code, Ch. 99, § 7, p. 363, authorizing deeds to be acknowledged before any two justices of the peace, for any county or corporation of the U. S., and the certificate of the justices is sufficient for the admission of the power of attorney to record, with the conveyance, although it does not certify the instrument to any court or clerk's office, for the purpose of being recorded. *Shanks et als. v. Lancaster*, 5 Grat. 110.

3. A clerk of a county court endorses on a deed that it was on that day exhibited in his office, acknowledged by the parties thereto and admitted to record. In fact that the deed was acknowledged, and the certificate en-



dorsed thereon, out of the office, and then was taken by the clerk to the office, and deposited there. The deed was valid, as a recorded deed from the date of the certificate. *Carper et als v. McDowell*, 5 Grat. 212.

4. A deed is properly admitted to record, upon a certificate of acknowledgement, describing the officers taking it, as aldermen of the city of New York. *Willis v. Cole et als.*, 6 Grat. 645.

5. A deed executed in 1799 which shews upon its face, that the parties to it resided out of Virginia, was properly admitted to record, upon the certificate of acknowledgement, by the Mayor of a city, in another State describing himself as such, and purporting to be under the seal of the city. *Coles v. Miller et als.*, 8 Grat. 6.

6. The certificate is sufficient evidence that the grantor resided, for the time, in said city, though the deed described him as being a citizen of another State. *Ibid.*

7. It seems that residence, however temporary, is sufficient to authorize the acknowledgement of a deed there, by a non-resident of Virginia, under the act of 1792, chap. 90, § 5. *Ibid.*

8. Under the act of October 1785, regulating conveyances, a deed is made by a citizen of Virginia, and acknowledged, in New York, before the Mayor. His certificate thereof is a sufficient authentication to authorize its admission to record. *Hasler's lessee v. King*, 9 Grat. 115.

9. Though the certificate of acknowledgement bears date, a short time before the act of 1785 went into operation, yet having been intended to be made under that act, the authentication is sufficient to authorize its admission to record. *Ibid.*

10. Though not admitted to record within the time specified by the act of 1785, it was properly admitted in 1833, under the act of 1819. *Ibid.*

11. The certificate of the Mayor of New York being full and particular, and being made in his official capacity and under his official seal, should be presumed to be made in the manner such acts were usually authenticated by him. *Ibid.*

12. A deed executed in Boston, in December 1798, by parties living there, conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses, before the court of Suffolk County, signed by a party, describing himself as clerk of the court; though no seal is attached to the certificate. *Smith et als v. Chapman*, 10 Grat. 445.

13. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either

for the purpose of proving the due execution of the deed, when called in question, or for the purpose of having it admitted to record. *Johnston and wife v. Slater et al.*, 11 Grat. 321.

14. A deed admitted to record upon proof by subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded. *Ibid.*

SEE DEEDS.

---

### REMAINDER.

1. The trusts declared in a marriage settlement were, for the husband for the joint lives of husband and wife. If she survived, the whole property to be absolutely vested in her, but if he survived, to him for life and at his death to the children of the marriage, in equal proportions; and if no child of the marriage or such child should die before age, then to the brothers and sisters of the wife, to be equally divided among them. Held 1. The wife has no power to dispose of the property during coverture. 2. The remainder vested in the children on their attaining full age. 3. A child dying within age, without issue, the estate vested in the survivors. *Whiting v. Rust*, 1 Grat. 483.

2. The statute of limitations does not begin to run against the owners of a remainder in slaves, in favor of the purchaser of the life-estate, until after the death of the life-tenant. *Ball et als v. Johnsons' ex'or et als.*, 8 Grat. 281.

---

### REMOVAL OF CAUSES.

1. If a case of unlawful detainer has been pending in the county court, for more than twelve months, without a final decision, it may be removed on motion to the circuit court. *Harrison v. Middleton*, 11 Grat. 427. *Kincheloe v. Tracewells*, *id.* 587.

2. All civil causes, of which the circuit court has either original or appellate jurisdiction, may be removed from the county to the circuit court, upon motion, after they have been pending in the county court for more than one year. *Ibid.*

---

### RENTS AND PROFITS.

1. Heirs and devisees are entitled to the rents and profits of the real estate, descended or devised, until a decree of the court subjecting them to the payment of debts. *Hobson v. Yancey et als.*, 2 Grat. 73.

2. A judgment lien does not give title to rents and profits, until after a decree. *Leake v. Ferguson*, 2 Grat. 419.

3. When no demand has been made by the vendor, previous to his filing a bill to set aside the sale, and the court sets it aside on the ground of mutual mistake, the court will only decree rents and profits from the filing of the bill, and will decree interest on the purchase money for the same time. *Irick and wife v. Fulton's ex'ors*, 3 Grat. 193.

4. When the real estate of a testator is necessary for the payment of his debts, an account of the rents and profits from his death may be directed by an interlocutory decree, for the purpose of ascertaining what rents and profits had accrued from that period, and by whom they had been received, in order to enable the court to decide by its future decree what persons, if any, are accountable therefor. *McCandlish adm'r, &c., v. Edloe et als.*, 3 Grat. 330.

5. A trustee accountable for rents received by him, is chargeable with interest thereon. *Mundy v. Vawter et als.*, 3 Grat. 518.

6. A partition of land is made under a decree which is acquiesced in for many years, but is afterwards set aside. In the account for rents and profits, the estimate should be upon the value at the time of the partition. *Chinn et als. v. Murray et als.*, 4 Grat. 348.

7. Trustees, by authority of an act of assembly, sell and convey lands, reserving a ground rent to be paid to the proprietor of the land when he shall be ascertained. The statute of limitations does not bar the recovery of the rent. *Mulliday v. Machir's adm'r.*, 4 Grat. 1.

8. In a suit by the proprietor to recover ground rents, the defendant in his answer, admits the rents have not been paid. Lapse of time is no bar to the recovery. *Ibid.*

9. Interest will not be allowed upon ground rents which the proprietor has unreasonably delayed to sue for. *Ibid.*

10. Trustees under an act of assembly, sell and convey land reserving a ground rent to the proprietor, when he shall be ascertained. The deed not having reserved any right of re-entry or distress, and containing no covenant by the purchaser to pay the rents, and the proprietor not being a party to the deed, the party claiming under the proprietor is entitled from the difficulty of proceeding at law to come into equity to recover the rents. *Ibid.*

11. A tenement under a lease is sold, the vendor reserving the rent. If in consequence of the absolute conveyance, the right of the vendor to enforce the payment of the rent is lost, the purchaser is personally liable if the rent is collected or released by him. *Kyles v. Tate's adm'r.*, 6 Grat. 44.

12. Salt works are rented for two-thirds of the salt made, and the lessees covenant to make at least sixty thousand bushels of salt in each year. The landlord is not entitled to distrain or sue for forty thousand bushels, but only two-thirds of the quantity actually made. *Prestons v. McCall*, 7 Grat. 121.

13. For the failure to make sixty thousand bushels in one year, the proper action would be for the damages occasioned thereby, and to the extent of such failure; and not for a specific rent of forty thousand bushels of salt. *Ibid.*

14. During the first year, the lessees, with the assent of the lessors, assign their lease; the assignees covenant to assume and pay all the contracts, debts, and liabilities of the lessees relating to the salt-making business. On the next day the assignees take a new lease, paying a money rent. The taking a new lease operated as a surrender of the first, and extinguished the liabilities of the assignees prospectively; and as assignees they were not liable for prior breaches of contract by the assignors. *Ibid.*

15. The assignees were liable by their contract to the lessor for arrears of salt rent, whether the salt was then on hand or had been sold. *Ibid.*

16. The surrender of the first lease before the end of the year, prevented a breach of the covenant to manufacture sixty thousand bushels of salt a year. *Ibid.*

17. Though the lessors were not parties to the assignment of the lease, yet as it was made with their assent, which by the terms of the lease, was necessary, they have the right to enforce the contract of the assignees, to pay the debts of the lessees, so far as the lessors are concerned. *Ibid.*

18. A mortgagee is in possession and the mortgagor enjoins a sale of the land advertised to be made under a prior deed of trust, upon the ground that the debt is usurious. The court holds that the debt is partly usurious and partly *bona fide*, and that the deed is a valid security for the part that is *bona fide*; and directs a sale of the property for the payment of the part that is *bona fide*. The proceeds of sale, not being enough to pay this debt and what was due on a prior deed, the mortgagee is not to account to the prior creditor for the rents and profits of the property, there having been no application for a receiver, or that he should be held to account as such. *Bank of Washington v. Hupp*, 10 Grat. 23.

19. Though by the terms of the mortgage, the mortgagee had a discretion to apply the profits to pay his own debt or those for which he was surety or to the debt of the party secured by the prior deed of trust, he was not bound to apply any of the profits to this prior debt. And this especially as the holders of that debt claimed not under the mortgage but against it. *Ibid.*

20. A landlord having distrained for rent in arrear reserved in salt, has

the affidavit and warrant of distress returned to the circuit court; and the defendant appears there, and a jury is empaneled to ascertain the value of the rent in arrear, and not being able to agree are discharged, and the landlord dismisses the case in that court. He may then apply to the county court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress. *Brooks v. Wilcox*, 11 Grat. 411.

21. If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy. *Ibid.*

22. The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent *said* to be due. *Ibid.*

23. The only object of the proceeding before a jury in the case of a distress for rent, is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a warrant has been levied for rent reserved in something other than money, and that it is due and in arrear. *Ibid.*

24. The jury having ascertained the value of the rent in arrear, the court made an order directing the officer to sell the property distrained as directed by law; and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute. *Ibid.*

25. Under the act of March 2nd, 1827, the landlord was entitled to interest on rent in arrear from the time it was due. *Ibid.*

---

## REPLEVIN.

Defence, in the nature of set-off, authorized by the Act Sup. Rev. Code, ch. 62, may be set up in the action of replevin. *Murray, Caldwell & Co. v. Pinnington*, 3 Grat. 91.

---

## RES GESTA.

*Quære*: Whether upon a trial for murder, the declarations of the deceased, made immediately after the wound was inflicted and before he had time to fabricate a story and when the *lis mota* did not exist, may not be given in evidence as part of the *res gestae*. *Hill's case*, 2 Grat. 594.

## RETAINER.

1. An administrator is not entitled to retain for his debt due by simple contract, as against bonds with collateral conditions, creating contingent liabilities, which may never occur, though such retainer is made before the breach of such condition, and without notice of the existence of such bond. *Cookus v. Peyton's ex'or.*, 1 Grat. 431.

2. A surviving partner, administrator of his deceased partner is entitled to retain out of the separate estate in his hands, against separate debts of no higher dignity, for all debts for which he is entitled to share the separate estate with the separate creditors. *T. Morris' adm'r v. S. Morris' adm'r et als.*, 4 Grat. 293.

## REVIVOR.

1. One of several appellants dies after the appeal is perfected in the appellate court; either party may have the appeal revived, in the name of the representative of the deceased appellant; and the party wishing to have it done, must do it. *Raine et als v. Bank of Va.*, 4 Grat. 150.

2. Where the defendant in a proceeding of unlawful detainer, dies pending an appeal by the plaintiff below, the cause cannot be revived. *Chapman v. Dunlap*, 4 Grat. 86.

3. What delays in a chancery cause, will not amount to an abandonment of the cause, or deprive the party of his right to waive and prosecute it. *Chinn et als v. Murray et als.*, 4 Grat. 348.

4. A creditor may come into equity, to subject land in the hands of the donee of his debtor, though the decree against the debtor has not been revived against his administrator and no execution has ever issued upon it. *Burbridge v. Higgins' adm'r.*, 6 Grat. 119.

5. Where a party to a cause pending in the supreme court of appeals, dies pending the appeal, it is not necessary to revive the cause in the name of his representative; but the case may be revived when it goes back to the court below. *Reid's adm'r v. Strider's adm'r.*, 7 Grat. 76.

6. The act, 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a *scire facias* to revive a judgment, is not repealed by the act of March 20th, 1831, Sup. Rev. Code, ch. 197, § 2, on the same subject. *Williamson v. Crawford*, 7 Grat. 202.

7. Upon a *scire facias* to revive a judgment, neither a declaration nor a rule to plead is necessary, and if the writ is made returnable to the rules, and the defendant makes default, there should be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. *Ibid.*

8. In a proceeding to recover damages against the Upper Appomattox Company, under the 9th section of the act of 23d of February, 1835, Sess. Acts, p. 82, the jury having returned their report ascertaining the damages, and the company having excepted to it and obtained a continuance, the plaintiff dies. The proceeding may be revived by the administrator, and not by the heirs. *Upper Appomattox Company v. Hardinge*, 11 Grat. 1.

9. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the revived judgment to restrain the issue of an execution thereon. *Richardson's adm'r v. Prince George Justices*; 11 Grat. 190. *Poindexter's adm'r v. Same. id.*

See SCIRE FACIAS.

---

### REVOLUTIONARY CLAIMS.

1. Officers of the Virginia line in the Continental establishment, who became supernumeraries, before the passage of the act of May 1779, ch. 6, are not entitled to half-pay for life under that act. *Slaughter's adm'r v. Commonwealth*, 2 Grat. 391. *Commonwealth v. Peyton's adm'r., id.* 393.

2. Such supernumerary officer, having been appointed by the executive of Virginia, superintendant of public works and commissioner of stores, and acting as such to the end of the war, is not entitled to half-pay for life, under the act May 1779, ch. 6, *id.*, 393.

3. A claim for half-pay for life, as Surgeon's mate to one of the regiments of the Virginia Continental establishment, during the revolutionary war rejected, there being no proof of service to the end of the war. *Commonwealth v. Yates' adm'r.*, 9 Grat. 693.

4. An officer becoming a supernumerary after the passage of the act of 1778, stands on the same footing as to his claim for commutation, or half-pay for life, as one becoming a supernumerary before the passage of the act. *Ibid.*

---

### ROADS.

1. In controversies concerning roads, no appeal or *supersedeas* lies from an interlocutory order of the county court. *Trevilian v. Louisa R. R. Co.*, 3 Grat. 326. *Hancock v. Richmond and Petersburg R. R. Co., id.* 328.

2. An appeal as of right from orders of the county court, in controversies concerning roads, only exists where the controversy is concerning the

establishment of a road; and not when it is a collateral controversy concerning the damages occasioned by a road already established. *Ibid.*

3. No limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large. That is a matter which addresses itself not to the authority, but the discretion of the court. *Lewis v. Washington*, 5 Grat. 265.

4. The true limit to the authority of the court to establish a road is in the purposes for which the road is to be employed. A *terminus* of the proposed road must be at the court house, or a public warehouse, landing, ferry, mill, coal mine, lead or iron works, or the seat of government, or in an established road leading to one or more of these places; but the other *terminus* may be at any place, whether public or private, of any description, and the road may accommodate many or one. *Ibid.*

5. The county court having established a proposed road, may authorize a particular individual to open it. *Ibid.*

6. A county court professing to proceed under the act of 1819 in opening a road, it is not necessary that the record of their proceedings shall shew that the county court had previously dispensed with the act of 1835 in relation to roads, and had retained the act of 1819. *White v. Coleman*, 6 Grat. 138.

7. In an appellate court the previous order will be presumed, unless the party opposing the opening the road has called for the order and spread the whole evidence on that question on the record. *Ibid.*

8. A county court makes an order opening a road, but does not direct the damages assessed to the contestant to be paid to him. The court may at the next term, with the consent of the parties, reinstate the cause.—*Ibid.*

9. Persons who unite in a petition for a road, but do not become parties on the record, may be appointed viewers of the proposed route of the road. *Ibid.*

10. The damages assessed to the owners of the land through which the road passes, and the costs of the inquest, should be paid out of the county levy; but the other costs of the applicant for the road should be recovered against the contestant. *Ibid.*

11. The mere use of a road by the public, for whatever length of time, will not constitute it a public road. *Kelly's case*, 8 Grat. 632.

12. A mere permission to the public, by the owner of land, to pass over a road upon it is, without more, to be regarded as a license, and revocable at the pleasure of the owner. *Ibid.*



13. A road dedicated to the public must be accepted by the county court upon its records before it can be a public road. *Ibid.*

14. If a county court lays off a road before used into precincts, and appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if after notice of such claim the owner of the soil permits the road to be passed over for a long time, the road may be well inferred to be a public road. *Ibid.*

15. An appeal to the circuit court is demandable, as of right, from an order of the county court discontinuing a public road. *Senter et als. v. Pugh*, 9 Grat. 260.

16. The county court having made an order establishing a public road, and directing it to be opened, may entertain and act upon an application to discontinue the road before it is opened. *Ibid.*

---

## SALES.

1. Where the owner of personal chattels sells and delivers them to the purchaser, a title to the property passes, though voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations of the latter to the injury of the former in regard to the consideration. In which case the vendor may reclaim his property from the vendee, but not from a *bona fide* purchaser from or under the vendee, for value paid, without notice of the fraud. *Williams v. Givens*, 6 Grat. 268.

2. The rule is not varied by the circumstance that the fraudulent purpose has been accomplished by the vendee's knowingly paying the consideration in counterfeit money, received by the vendor under the belief that it is genuine. *Ibid.*

3. When a contract is made for the purchase of an article thereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but remains at the risk of the seller. *Dixon v. Myers & Co.*, 7 Grat. 240.

4. In written proposals for a sale of stock in a mining company, if the representations embraced therein are false as to any material fact by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded on each representation is void, whether or not the vendors knew the representations to be false at the time they were made, and whether or not made with a fraudulent intent. *Crump v. United States Mining Company*, 7 Grat. 352.

5. In such case the suppression from the written proposals of any fact within the knowledge of the vendors materially affecting the value of the thing sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material facts, if the purchaser is injured thereby. *Ibid.*

6. If in such case the representations contained in the written proposals were in all material respects true, and no fact within the knowledge of the vendors materially affecting the value of the thing sold was suppressed to injury of the purchaser, the subsequent failure of the mine in value and productiveness does not impair the right of the vendors to enforce the contract. *Ibid.*

7. An agent to sell property is furnished by his principal with written proposals containing the terms of sale and a description of the property. If the agent makes other representations of the value and condition of the property, which are false, and thus induces persons to buy, the principals, though they neither authorized nor were informed of these representations, are bound by them, and the contracts are void. *Ibid.*

---

### SCIRE FACIAS.

1. Upon the trial, on a *scire facias* against bail, the function of a jury is exhausted when it negatives the defendants plea and it is then the province and duty of the court to enter up a judgment according to the *scire facias*. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

2. If in such case, the jury proceed to find a verdict for the plaintiff and find a sum different from that stated in the *scire facias*, it is merely supererogatory; and the court should give judgment for the proper sum. *Ibid.*

3. The court below having given judgment for the plaintiff, in a *scire facias* against bail for too large an amount, the appellate court will reverse the judgment and give judgment for the proper sum. *Ibid.*

4. A *scire facias* against the heir upon a judgment against the ancestor, which does not state that proceedings have been taken against the personal representative, is not defective on demurrer. *Roger v. Denham's heirs*, 2 Grat. 200.

5. In such case the heir must set up the defence by way of plea in abatement. *Ibid.*

6. The act 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a *scire facias* to revive a judgment, is not repealed by the act of March 20th, 1831, Sup. Rev. Code, ch. 197, § 2, on the same subject. *Williamson v. Crawford*, 7 Grat. 202.

7. Upon a *scire facias* to revive a judgment, neither a declaration nor a rule to plead is necessary. And if the writ is made returnable to the rules, and the defendant makes default, there should be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. *Ibid.*

8. Where by law separate terms of a circuit court are appointed for the trial of civil and criminal causes, a recognizance in a criminal case is properly made returnable to a term for the trial of criminal causes; and a *scire facias* thereon is properly made returnable to the term for the trial of civil causes or to the rules; the first being a criminal and the other a civil proceeding. *Archer v. The Commonwealth*, 10 Grat. 627.

9. In declaring on a recognizance it is not necessary to aver the existence of the particular facts which show that the court officer taking had authority to take it. *Ibid.*

10. Judgment is recovered by justices for the benefit of the marshal of the Williamsburg chancery court. The defendant being dead, the *scire facias* to revive the judgment recites it correctly, and adds, "which marshal was W." This is no variance. *Richardson's adm'r v. Prince George Justices*, 11 Grat. 190. *Poindexter's adm'r v. Same*, *id.*

11. The marshal being dead, the *scire facias* recites that it was awarded at the instance of M, his administrator. It was not necessary to recite at whose instance it was awarded, and the recital therefore is surplusage, and does not vitiate the *scire facias*. *Ibid.*

12. It not appearing from the *scire facias*, the record or the defendant's plea, that the foundation of the judgment was a bond requiring a relator in the action, it must be regarded as a common law liability, subject to be sued on in the name of the obligees without a relator; and whether W was marshal, or M was his administrator, is a question in which the defendant has no interest; and it cannot be raised by him by plea in bar to the plaintiff's claims. *Ibid.*

13. The *scire facias* stated that the judgment had been suspended by injunction. This was unnecessary, and may be regarded as surplusage; and a plea in bar that the judgment had not been suspended by injunction, offered no bar to the *scire facias*. *Ibid.*

14. The *scire facias* further stated that the injunction had been dissolved. A plea that it had not been dissolved is bad; and an issue made up upon it is immaterial. Therefore, though improper evidence upon it is admitted, it is no cause for reversing the judgment. *Ibid.*

15. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant; and the injunction operates upon the revived judgment on the *scire facias* to restrain and prohibit the issue of an execution thereon. *Ibid.*

## SECURITIES.

1. Although a creditor having remedies against several persons, each equally responsible to him, may proceed to enforce his debt against either, and is not bound to proceed against all, yet he waives this right, by convening all before the court and asking that the persons and subject, of right chargeable with the debt, shall pay it. *Bentley et als v. Harris adm'r.*, 2 Grat. 357.

2. Partners make a note and then the partnership is dissolved. The partner who is authorized to settle up the business of the partnership cannot renew the note in the partnership name, so as to bind the other partner. *Parker v. Cousins*, 2 Grat. 372.

3. In such a case, though the last note does not bind the partner who has not executed it, the first note is still a valid security as against him, though it was surrendered, when the last note was taken. *Ibid.*

4. The taking a new security from one of two joint debtors, will release the other, *only* where there is an agreement by the creditor, express or implied, that he shall be released. *Ibid.*

5. The court granting administration or admitting an executor to qualify as such, has a discretion in regard to the amount of the security. And the general practice of requiring security in double the estimated value of the estate is a proper exercise of that discretion. *Atkinson v. Christian*, 3 Grat. 448.

6. The security authorized under the 41st section of the act 1 Rev. Code, ch. 104, is not in lieu of, but in addition to, the original security; and both are bound. *Ibid.*

7. In determining the amount for which other good security ought to be required, regard ought to be had to the value of the estate remaining unadministered, including any accessions thereto beyond the original estimate thereof, and to the extent of the available security still furnished by the original bond. *Ibid.*

8. The court granting administration or probat originally, alone has authority to take additional security when it may be required. And if it is directed by an appellate court, the order is directory only to the court granting the administration or probat. *Ibid.*

9. A vendor of land retaining the title, his security is not affected by lapse of time or the statute of limitations. *Hanna v. Wilson*, 3 Grat. 243.

10. A creditor having one security for three bonds, and another security for one of them, may apply the proceeds of the first security to the two bonds not secured by the last security. *Vanes v. Monroe*, 4 Grat. 52.

11. Two tracts of land are sold together. The purchaser sells them separately, and is still indebted for a part of the purchase money; which is known to both of his vendees. The tract last sold must be first applied to the payment of the purchase money due on the original sale. *Alford v. Helms*, 6 Grat. 90.

12. A debtor assigns certain securities to his creditor in satisfaction of his debt, being at the time under a misapprehension as to their amount; and they prove to be largely more than is necessary to discharge the debt. A court of equity will restrict the effect of the assignment to the full satisfaction of the debt. *Jennings v. Palmer*, 8 Grat. 70.

13. A deed of trust is given to secure several bonds, some of which were afterwards assigned. The benefit of the deed of trust will pass with the assignment. *Schofield v. Cox et als.*, 8 Grat. 533.

See SURETIES.

---

### SET-OFF.

1. A vendee of land, being entitled to an abatement from the purchase money, and having become insolvent, a purchaser from him is entitled to set-off this sum against the bond for the purchase money, in the hands of an assignee. *Taylor's adm'r v. Spindle*, 2 Grat 44.

2. If there were two bonds, the set-off should be first applied to the bond last assigned. *Ibid.*

3. If the two bonds were assigned at the same time, or if both were in hands of the vendor, and judgment had been obtained on one, the set-off should be first applied to the other. *Ibid.*

4. If the vendee has paid part of the purchase money, either to the vendor or his assignee, with notice of the prior assignment; to that amount, the purchaser from him cannot set-off against the first assignee. *Ibid.*

5. A defendant in equity, having pleaded the statute of limitations to plaintiff's claim, which is sustained as to part, he will not be allowed to set up simple contract claims of the same sort against the plaintiff's claims. *White v. Turner's adm'r.*, 2 Grat. 502.

6. The Act, Sup. Rev. Code p. 157, ch. 62, authorizing defences in the nature of set-off, authorizes such defences in actions of replevin. *Murray, Caldwell & Co. v. Pennington*, 3 Grat. 91.

7. In a lease the lessor covenants to put certain repairs upon the demised premises, which he fails to do. In an action of replevin, on a distress for rent, the lessee may set off the damages he has sustained by the failure of the lessor to make the repairs. *Ibid.*

8. An obligor who has given a new bond to a remote assignee, and taken in and cancelled the first, especially if he had notice, at the time when he gave the new bond, of incumbrance on the land for the purchase money of which the original bond was given, will not be entitled to set off the amount of the incumbrance against the bond. *Washington v. Pollard*, 5 Grat. 432. *Same v. Lumpkin*, *id.*

9. Where a defendant does not file a plea of set-off, but files his account and gives notice of set-off, the plaintiff cannot reply the statute of limitations, and he may therefore rely on it in evidence. *Trimyer v. Pollard*, 5 Grat. 460.

10. If a set-off accrued before the action was brought, the period of limitations is five years before the commencement of the action. *Ibid.*

11. If the set-off accrued after the action was brought, the period of limitation is five years before plea pleaded, or account of set-off filed. *Ibid.*

12. One partner sells out to a third person, and the new firm undertakes to pay the debts of the old firm. The retired partner becomes indebted to the new firm, for which he executes his bond with sureties; and this is assigned for value. The new firm fail, not having paid the debts of the old firm; and the retired partner pays them. He is entitled to set off the debts so paid, against his bond in the hands of the assignee. *Hupp v. Hupp*, 6 Grat. 310.

13. A judgment on a forthcoming bond was enjoined at the suit of the surety, on the ground that he has an action pending against the plaintiff in the judgment for a larger amount, and that he is insolvent. *McClellan v. Kinnaird*, 6 Grat. 352.

14. In *assumpsit* by an administrator, for a debt due to his intestate in his life-time, the defendant cannot set off a debt due to him for money paid as the surety of his intestate since his death. *Minor v. Minor's adm'r*, 8 Grat. 1.

15. In *assumpsit*, defendant pleads *non assumpsit*, and with it files an affidavit of set-off, and the set-off, which is a note. Though there is no plea of set-off or bill of particulars, the evidence in relation to the set-off is properly admitted. *Bell v. Crawford*, 8 Grat. 110.

16. A joint interest in husband and wife, cannot be set off by a debt due from the husband *Glazebrook's adm'r v. Ragland's adm'r.*, 8 Grat. 332.

17. Defendant prevented by unavoidable accident from defending himself at law and setting up off-sets cannot enjoin the judgment in order to set them up in equity, the off-sets being no way connected with the debts sued upon, and he having a plain remedy for the recovery of his claims at law or in equity. *Hudson v. Kline*, 9 Grat. 379.

18. *Quære*: If in an action by an assignee of a bond against the obligors, the latter can set up an offset which at the time of the assignment was an equitable offset, but which by an arrangement by him subsequent to the assignment, became a legal offset? *Ragsdale v. Hagy et als.*, 9 Grat. 409.

19. A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee of a bond given for the purchase money, on the ground of difficulties in the title, though the title is decreed to him in the suit, he is entitled to set up in equity offsets which he held against the vendor prior to the assignment, and he was not bound to plead them at law. *Ibid.*

20. A defendant may have leave to file an additional account of off-sets when it will not produce delay to the plaintiff, and it is necessary to attain the justice of the case, and if the plaintiff obtains leave to amend his declaration as the defendant is entitled to a continuance, there can be no objection to filing the account on the ground of delay. *Perkins' adm'r v. Hawkins' adm'r.*, 9 Grat. 649.

21. Though the bond of two is not a good set-off at law in an action by one of them on a bond, yet it may be made a good set-off by agreement between the parties, and is competent evidence accompanied by such proof of a set off. *Ibid.*

22. In an action of *assumpsit* for various sums of money lent or paid for the defendant's intestate, though payments and set-offs cannot be proved without an account of such payments and set-offs filed, yet defendant may prove that the money sued for or any part of it, was not lent or advanced for the intestate, but was paid out of the money of the intestate in the hands of the plaintiff. *Johnson's ex'x v. Jennings' adm'r.*, 10 Grat. 1.

23. An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or set-offs, which he might have pleaded at law; and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defense at law, or he should have filed interrogatories to the plaintiff under the statute. *Gerger v. Strange's ex'or.*, 10 Grat. 499.

---

## SETTLEMENTS.

1. By marriage settlement, the whole interest in the wife's property is vested in her. She has the full power of disposing of or charging her personal estate, to all intents and purposes, as if she were a *feme sole*; and this though there is a clause prescribing the mode of disposition. *Woodson, trustee, v. Perkins*, 4 Grat. 345.

2. A married woman having given a mortgage on her separate estate to secure a debt, afterwards obtains a further loan from her creditor. Her

trustee will not be allowed to redeem the mortgage without paying the debt subsequently contracted. *Ibid.*

3. There having been no misconduct in the trustee of a married woman, it is error to make a personal decree against him for the debt of his *cestui que trust*. *Ibid.*

4. In a suit brought by a trustee of a married woman, to assert and defend her rights, in which a full opportunity is afforded the *cestui que trust* to protect and defend her rights, it is not necessary that she should be made a party. *Ibid.*

5. Upon a settlement by a husband on himself and wife, and to the survivor for life, she is given a power of appointing to whom the land shall go in the event that she shall die without leaving issue at her death; so that such disposition is signified in writing under her hand and seal, or by last will and testament. The wife afterwards unites with her husband in a deed, by which she relinquishes her right in the land for a valuable consideration, and dies without issue, although she was not privily examined as to her execution of the deed, yet the same being under hand and seal in writing, as prescribed in the deed vesting in her the power, she thereby destroyed her power of appointment. *Hume v. Hord et als.*, 5 Grat. 374.

6. The wife having the absolute power to give the land to whom she pleased, by the execution of the power in the manner aforesaid, it follows that she had the right for valuable consideration, and with the assent of all persons interested in the land, to destroy the power by the same means, and to permit the land to pass as if the power had never existed. *Ibid.*

7. Marriage articles made between an infant *feme* and her intended husband beneficial to her, and her contemplated issue, are obligatory upon the parties, and will be enforced in a court of equity by a settlement in conformity therewith, on the application of the issue of the marriage. *Healy et als. v. Rowen et als.*, 5 Grat. 414.

8. Marriage articles entered into between the guardians of an infant *feme* and her intended husband, to which she is not a party, are of no obligatory force upon her. *Ibid.*

9. An infant *feme* may, by her acts, after she attains full age, and when *sui juris*, adopt or ratify a marriage agreement, made for her by her guardian. *Ibid.*

10. A testatrix bequeaths property to her married daughter, for her separate use; so much thereof as may be in existence at her death, to go to her children, or their descendants, if any there be. And to effect the purpose of the bequest, she appoints a trustee, to whom the property is to be delivered by the executor, and she directs that all receipts given to the trustee by the daughter for payments made to her of principal or interest of the property, shall be to him a full discharge. The daughter is entitled to use both the principal and interest of the property at her discretion. *Brown v. George*, 6 Grat. 424.



11. An unrecorded post-nuptial settlement by a husband on his wife, of personal property derived from her father's estate, of which he retains possession is void as to his creditors. *Lewis et als. v. Caperton's ex'ors et als.*, 8 Grat. 148.

12. Property conveyed in trust by a husband for himself and wife, by deed not duly recorded, is sold under a decree at their suit against the trustees, and conveyed by deed duly recorded. It is valid against a subsequent creditor of the husband. *Glazebrook's adm'r v. Ragland's adm'r*, 8 Grat. 332.

13. Where, by express contract before marriage, the husband releases all his marital rights to the wife's property, both during marriage, and if he survives her, the wife is to be regarded to all intents as a *feme sole* as to such property, and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died *sole* and intestate. *Charles v. Charles*, 8 Grat. 486.

14. A settlement which gives to the grantor a bare maintenance with his wife for life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property, as can be subjected to satisfy such after contracted debts. *Johnston v. Zane's trustees et als.*, 11 Grat. 552.

---

## SHERIFF.

- |                          |  |                                |
|--------------------------|--|--------------------------------|
| 1. Rights and Duties of. |  | 3. Proceedings by and against. |
| 2. Official Bond of.     |  |                                |

### RIGHTS AND DUTIES OF.

1. A purchase by the deputy sheriff of land sold for taxes, is illegal and the purchaser is trustee for the owner of the land. *Taylor's devisees v. Stringer*, 1 Grat. 158.

2. A sale by a sheriff, of an equity of redemption of lands, surrendered by a debtor in execution, upon his taking the benefit of the insolvent act, is legal. *Tiffany v. Kent*, 2 Grat. 231.

3. Upon taking an oath of insolvency, the property and rights of the insolvent debtor vest in the sheriff, and he, as representing the creditor, may assert his rights, and set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor. *Clough, &c., v. Thompson*, 7 Grat. 26.

4. The sheriff who is the trustee for all interested in the estate of an insolvent debtor, is not justified in selling the interest of the debtor in the

estate surrendered in the schedule, or vested by law in the sheriff, when, owing to alleged incumbrances, the validity of which is controverted, or the extent whereof is not ascertained and uncertain, the property is not in a condition to be disposed of, for its value. *Ibid.*

5. The real estate of an insolvent debtor vests in the sheriff of the counties where it lies, and the sheriff of the county where the oath is taken, is not authorized to sell it. *Ibid.*

6. Debts due to the insolvent debtor, and slaves and other personal property not in the possession of the sheriff, or which is in such a condition that he cannot take possession without process, cannot be sold by him, so as to vest the legal title in the purchaser. *Ibid.*

7. Where a variety of property is embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, is a violation of duty on the part of the sheriff; and the purchaser at such sale, if he acquired the legal title, would, in a court of equity, be treated as a trustee for the benefit of those interested. *Ibid.*

8. A high sheriff may farm the sheriffalty, and authorize the party farming it, to superintend and manage the office as his agent, so that the acts of this agent in controlling and directing the other agents, will be binding upon the high sheriff. *Holland v. Helm's adm'r*, 7 Grat. 245.

9. Such a contract does not and cannot divest the high sheriff of the power to dismiss any of the deputies employed in the office, or to refuse to permit any person selected by the farmer of the sheriffalty to qualify as deputy. *Ibid.*

10. The farmer of the sheriffalty required the other deputies to pay over the moneys collected on executions to him, and one of the deputies having done so, though he might in some cases be liable to the creditor in the execution, he is not liable to the high sheriff. *Ibid.*

11. In the first year of a sheriff's term of office, an execution is returned, "levied, and not sold for want of bidders." After the sheriff goes out of office, upon a "*venditioni exponas*," the same deputy returns it "satisfied." The deputy for the purpose of this execution, was still the deputy, and the high sheriff and his sureties are responsible for his acts. *Tyree et als. v. Wilson*, 9 Grat. 59.

12. The levy having been made in the first year of the high sheriff's term, the sureties of that year are responsible. *Ibid.*

13. In the first year of the high sheriff's term of office, an execution against a third person and one of the deputies, is returned by another deputy, "levied, and not sold for want of bidders." After the sheriff goes out of office upon a *venditioni exponas*, the deputy against whom the execution was, returns it, satisfied to a certain amount. The high sheriff is liable upon the return. *Tyree et als. v. Donnally*, 9 Grat. 64.

14. The high sheriff cannot object that the debtor deputy received the money. *Ibid.*
15. The high sheriff is liable to the plaintiff, though the money was received by the deputy before the *venditioni exponas* issued. *Ibid.*
16. A sheriff is entitled to commissions on a *ca. sa.* executed on the defendant, who, after taking the benefit of the prison bounds, pays the amount of the execution to the plaintiff, by whom he is thereupon discharged from custody before the return day of the execution. *Gardner v. Neal*, 9 Grat. 85.
17. Where a power with a trust is vested by will in the executors, and one of them dies, and the other is removed, and the estate is committed to the sheriff, he was under the act of 1819, 1 Rev. Code, ch. 104, § 52, p. 388, authorized as such administrator, to execute the power and trust, and is liable for failure to execute it. *Mosby's adm'r et als. v. Mosby's adm'r*, 9 Grat. 584. *Miller v. Jones et als. Id.*
18. In such case the rents and profits of the land having been received by the deputies of the high sheriff, he is responsible for them.
19. If the sheriff was not authorized by the will to take possession of the land, and receive the rents and profits, yet the estate having been committed to the high sheriff, and his deputies having taken possession of the land, and received the rents and profits, on the principle that the high sheriff is responsible *civiliter*, though not *criminaliter*, for all the acts of his deputies done *colore officii*, he is bound to account for them. *Ibid.*
20. The deputy who farmed the sheriffalty gives bond with sureties, with condition to indemnify the high sheriff against all loss and damages which he may sustain in consequence of any failure or misconduct on the part of the deputy or of any other person whom he may employ to assist him in the office. The high sheriff being liable for the rents, the sureties of the deputy are liable to him for the default of the deputy and his assistant in the office. *Ibid.*
21. The fact that the county court has not provided a jail in which a debtor taken in execution may be confined, does not authorize the sheriff who has taken a debtor in execution to permit him to go at large. If no jail is provided by the county court, it is the sheriff's duty to provide one to keep the debtor, whom he has taken in execution in custody. *Stone v. Wilson*, 10 Grat. 529.
22. What arrangement of property by a debtor is fraudulent as to his creditors so as to vest it in the sheriff upon the debtor's taking the oath for the relief of insolvent debtors. *B. Staton v. Pittman, sheriff*, 11 Grat. 99. *Pittman, sheriff, v. R. Staton. Id.*
23. Though the insolvent debtor never had possession of the property,

but it was transferred by a fraudulent arrangement to a third person, the sheriff may recover the property from this third person. *Ibid.*

24. Though the property which consisted of slaves was sent to the premises of B, the father of the person to whom the property was transferred, and who was an infant, and lived with B, and she claimed it, and B did not, B is not liable for it. *Ibid.*

25. Where property was given in trust by a testator for his son, it was held to be subject to the son's debts, and to vest in the sheriff upon the son's taking the oath for the relief of insolvent debtors. *Cochran v. Paris et als.*, 11 Grat. 348.

### OFFICIAL BOND.

1. An action on the official bond of the sheriff for the misconduct of his deputy, in serving an execution must be at the relation of the plaintiffs in the execution. *Governor for Leightons v. Hinchman et als.*, 1 Grat. 156.

2. A bond by deputy sheriff and his sureties to the high sheriff for the faithful discharge of the deputy's duty, omits both in the penalty and condition, to designate the name of the deputy. There being nothing on the face of the bond to indicate that all named in the penalty were not appointed deputies, and the obligors having sealed and delivered the bond as it was, they are estopped from denying that they are deputies. *Cox et als. v. Thomas' adm'r.*, 9 Grat. 312.

3. Each obligor named in the penalty of the bond, must in such a case be regarded as principal as far as his acts are concerned, and the other as his sureties. *Ibid.*

4. Though some of the persons named in the penalty did not sign the bond, the parties so named who did sign it, are to be considered as the obligors who are bound, and are recited to be admitted as deputies. *Ibid.*

5. The bond reciting that the obligee was high sheriff, and the party proceeded against as such was deputy, it estops all the obligors from denying these facts. *Ibid.*

6. The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped thereby from denying that their principal was deputy unless the bond is invalid. *Cecil v. Early et als.*, 10 Grat. 198.

7. The bond of the deputy is not avoided by the fact that the county court did not enter upon the record that he was a man of honesty, probity, and good demeanor, and that he did not take the several oaths of office required by law to be taken by a deputy sheriff. *Ibid.*

## PROCEEDINGS BY AND AGAINST.

1. An indemnifying bond, given to the sheriff, on the sale of property under execution, which contains the conditions prescribed by the act of 1819, 1 Rev. Code, ch. 134, § 25, p. 533, though it does not contain the conditions prescribed by the act of 1828, Sup. Rev. Code, 272, is a good statutory bond, to protect the sheriff from the action of the claimant of the property. *Aylett v. Roane*, 1 Grat. 282.

2. An action may be maintained on the official bond of a sheriff, in the name of the person who was governor at the time the bond was executed, and it is not necessary to sue in the name of his successor in office. *Governor for Bryan v. McCulloch et als.*, 2 Grat. 175.

3. A sale by a sheriff, of an equity of redemption of lands, surrendered by a debtor in execution, upon his taking the benefit of the act for the relief of insolvent debtors, is legal. *Tiffany v. Kent et als.*, 2 Grat. 231.

4. A sheriff was permitted to amend his return upon an execution after an action founded on said return, has been commenced by the plaintiff in the execution against the sheriff, and his sureties on his official bond. *Wadsworth, &c., v. Miller et als.*, 4 Grat. 99.

5. A motion may be made by a high sheriff against his deputy for failing to pay over money received on an execution though the high sheriff has discharged the judgment against himself. *Weaver v. Skinker*, 4 Grat. 160.

6. Upon such motion, the high sheriff can only recover the amount of the judgment recovered against himself; and not interest on the aggregate amount of principal and interest. *Ibid.*

7. Where the plaintiff in the execution lives in the county, no demand of the money is necessary before proceeding to subject the high sheriff. *Tyree et als. v. Donnally*, 9 Grat. 64.

8. The statute gives fifteen *per cent. per annum* interest against a sheriff for failing to pay over money received on an execution. This statute is not controlled by the statute in relation to interest upon appeals. *Ibid.*

9. In entering a judgment against a high sheriff, damages are given from a date anterior to the return upon the *venditioni exponas*, but it was not demanded in the notice. This is a clerical error which may be corrected by the execution, and is not a ground for reversing the judgment. *Ibid.*

10. A county court having laid the county levy and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's book, and proceeded to collect the levy as far as it could be collected, and returned a list of insolvents, upon a motion by

one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendants to object that the county court was not legally constituted to be authorized to lay the levy, when it was done; nor can they object that the commissioner's book was irregularly made out, and not properly authenticated. *Cook, sheriff, et als. v. Hays*, 9 Grat. 142.

11. The amount collected by the sheriff not being sufficient to pay all the claims directed to be paid out of it, in the absence of proof that the sheriff has paid the claims other than that of the plaintiff, the law will not presume he has paid them. *Ibid.*

12. A demand upon the sheriff is necessary to sustain a motion against him and his sureties by a creditor of the county; but in an appellate court it will be inferred from circumstances. *Ibid.*

13. On a motion by the administratrix of a high sheriff against a deputy and his sureties, for failure to pay over money made on execution, the whole record of the cause on the motion against her is not necessary as evidence, but the judgment is sufficient; that and its recitals being *prima facie* evidence against the deputy and his sureties. *Cox et als. v. Thomas' adm'x*, 9 Grat. 323.

14. If the recovery by the creditor against the administratrix was barred by the statute of limitations, the deputy and his sureties must show it on the motion against them. It must be presumed, in the absence of proof, to be correct. *Ibid.*

15. The judgment of the circuit court against the high sheriff is conclusive of its jurisdiction, unless reversed on appeal; and the deputy and his sureties cannot question it on the motion of the administratrix of the high sheriff against them. *Ibid.*

16. Upon a motion by a high sheriff against a deputy and his sureties, they find a special plea, and the plaintiff replies specially, and relies on the facts therein stated, and especially on the bond, as an estoppel, though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. A demurrer to the application should not be sustained. *Cecil v. Early et als.*, 10 Grat. 198.

17. A sheriff may have leave to amend his return upon an execution after notice of a motion against him founded on the original return; and the amended return may be made by a deputy who did not make the first return. *Stone v. Wilson*, 10 Grat. 529.

18. A second notice to the sheriff is not necessary after the amended return; but the plaintiff may proceed upon the original notice. *Ibid.*

19. Under the act 1 Rev. Code of 1819, ch. 136, § 3, an action of debt

may be maintained against a sheriff for either a willful or negligent escape. *Ibid.*

20. In order to maintain the action, it is only necessary for the plaintiff to show the escape, which may be done by evidence *aliunde* the return on the execution. And to defeat the action, the sheriff must show the escape was tortious, and that fresh pursuit was made. *Ibid.*

21. Upon proof of the escape, the jury are bound to presume all that is necessary under the statute to be found in the verdict, unless the sheriff negatives by his proofs all consent or negligence on his part; and shows that he has used due means to re-take the prisoner. *Ibid.*

22. Under the act 1 Rev. Code of 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape—1st. Where the return on the execution states that the officer has taken the body of the debtor, and has it ready to satisfy the execution, and the plaintiff can show the escape *aliunde*. 2d. Where the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for an escape. *Ibid.*

23. A return by the sheriff that the county court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, itself shows an escape, and will sustain a motion against the sheriff. *Ibid.*

24. A return by the sheriff that the county court had not provided a jail, and that a debtor taken in execution had escaped without his consent or negligence, without adding that he had used due means to re-take him, is not sufficient to protect the sheriff; but a motion may be maintained against him upon the return. *Ibid.*

25. Upon such a motion the court occupies the place of a jury as to the facts, and is bound, upon a return of "executed," and proof of an escape, to presume that it was with the consent of the sheriff, unless he proves that it was without his consent or negligence, and that he had used due means to re-take the prisoner. *Ibid.*

---

## SLANDER.

1. *QUERE*: If in actions of slander under the statute Sup. to R. C., § 8, p. 284, the truth of the words spoken may be given in evidence in mitigation of damages? *Moseley v. Moss*, 6 Grat. 534.

2. In an action for a statutory slander, the plaintiff must declare under the statute. *Ibid.*

3. If plaintiff does not declare under the statute his declaration must

set out a common law slander ; and if the words do not amount to slander, they cannot be helped by the *inuendo*. *Ibid*.

4. It is no defence in an action of slander, even in mitigation of damages, that previous to the speaking of the slanderous words charged in the declaration, the plaintiff had used equally offensive and insulting words towards the defendant. *Bourland v. Eidson*, 8 Grat. 27.

5. In an action of slander, under the plea of not guilty, the defendant may in mitigation of damages, prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tends to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact relieve the plaintiff from the imputation involved in it. *Ibid*.

---

### SLAVES.

1. Slaves may be emancipated in Virginia by nuncupative will. *Phæbe v. Bogges*, 1 Grat. 129.

2. Testatrix emancipates her slaves. At the time of her death, she held jointly with others a remainder in slaves, after an estate therein for life. And after her death two of these slaves were allotted to her estate. *Held*: they are emancipated by her will. *Binford's adm'r v. Robin*, 1 Grat. 327.

3. In an indictment for selling ardent spirits to slaves, not necessary to state the names of the owners. *Smith and Burwell's case*, 1 Grat. 553.

4. On a parol gift of slaves, the slaves must come into the actual possession and remain with the donee or some person claiming under him to give to such donee a valid title to the slaves. *Anglin v. Bottom*, 2 Grat. 1.

5. A slave claiming a right to freedom, is not a necessary or proper party in a controversy between third persons, involving the question of his right to freedom. *McCandlish, adm'r, &c., v. Edloe, et als.* 2 Grat. 330.

6. Slaves emancipated by a will may propound it for probat. *Ben Mercer et als. v. Kelso's adm'r et als.*, 4 Grat. 106.

7. The owner of a slave hired out is responsible for medical attendance on the slave. *Isbell's adm'r v. Norvell's ex'or*, 4 Grat. 176.

8. Slaves having been sold by tenant for life, in the absence of proof of their present value, his estate will be charged with the price at which he sold the slaves. *Cross' curatrix v. Cross' legatees*, 4 Grat. 257.

9. An administratrix who hires out the slaves publicly, and hires them herself at very reduced prices, and then hires them out at advanced prices,



will be held to account for them at the advanced prices ; or, if they cannot be ascertained, for reasonable hires. *Ibid*

10. An administratrix or other fiduciary whose duty it is to hire out slaves for the benefit of *cestuis que trust*, will be held to account for interest on their estimated hires. *Ibid*.

11. Persons not holding slaves as fiduciaries will not be held to account for interest on estimated hires. *Ibid*.

12. An executor sells a slave belonging to his testator's estate, the sale not being necessary for the payment of debts, and he re-purchases the slave, and thereafter holds him as his own. The slave is the property of the estate, and the executor shall account for his annual hires with interest thereon, though he was not in fact hired out by the executor. *Rosser, ex'or of Wood, v. Depriest et als.*, 5 Grat. 6.

13. Persons who have been held as slaves, recovering their freedom, are in no case entitled to recover *mesne profits*. *Peter et als. v. Hargrave et als.*, 5 Grat. 12.

14. Equity has jurisdiction to enjoin the removal of slaves from the State by a party in possession, at the suit of a party claiming them as next of kin, where there is no administrator ; and the court will proceed to decide the rights of the parties, though the defendant appears and denies he is about to remove the slaves, and objects to the jurisdiction. *Robinson's ex'or, v. Day*, 5 Grat. 55.

15. The first plaintiff having but a life estate, and dying before the cause is decided, the remainderman may file a bill in the same court to prevent the removal of the slaves and to recover them. *Ibid*.

16. What is sufficient proof of a parol gift of slaves, and of their delivery to and continued possession by the donee. *Tutt v. Slaughter, adm'r*, 5 Grat. 364.

17. Slaves remaining in possession of one person on hire for more than five years are not subject to be taken in execution for his debts. *McKenzie et als. v. Macon*, 5 Grat. 379.

18. Slaves having been in the possession of the guardian of legatees for near five years after the death of the testator, the legatees may file a bill to enjoin a sale of the slaves under an execution against the person who is their guardian, without making the personal representative of the testator a party, though it does not appear he ever assented to the legacy. *Kelly v. Scott*, 5 Grat. 479.

19. The sale of slaves under an execution against a third person will be enjoined at the suit of persons claiming them as their own, without any allegation of peculiar value of the slaves. *Ibid*.

20. T. sells to P. a slave in which he has but a life estate, and P. in ignorance of the fact, and believing that he has the absolute interest in the slave, takes him out of the State and sells him. P. is liable to the forfeitures and penalties imposed by the act 1 Rev. Code, ch. 111, § 48, p. 431. *Poindexter, &c., v. Davis et als.*, 6 Grat. 481.

21. In such case P. is liable for hires of the slave from the time of the forfeiture. *Ibid.*

22. A conveyance of a slave by the owner, to take effect at his death, is not an estate in reversion in the contemplation of the act 1 Rev. Code, ch. 111, § 48, p. 431. *Ibid.*

23. A debtor remaining in possession of slaves for five years, under a parol loan, they are liable to satisfy his creditors, though possession is resumed by the lender before an execution was levied upon them. *Beale v. Digges et als.*, 6 Grat. 582.

24. In an action of detinue for a female slave, the recovery may be not only for the slave named in the writ, but for the children born since the commencement of the action. *Morris v. Peregoy*, 7 Grat. 373.

25. S by his will emancipates his slave at a specified future period, provided she shall leave the State within six months thereafter. But if she does not leave the State within six months, then she shall become a slave to his estate forever. And provided that the laws of the State shall so require her to leave it. The condition is void, and she is free, though she does not leave the State within six months after the time specified. *Forward's adm'r v. Thermer*, 9 Grat. 537.

26. Slaves emancipated by will, though sold under executions issued on judgments against the administrator with the will annexed, may maintain a suit in equity to recover their freedom. And if there is other estate of the testatrix subject to pay her debts, sufficient for that purpose, or if this and the hires and profits of all the emancipated slaves are sufficient to pay the debts in a reasonable time, the sale will be set aside. *Jincey et als. v. Winfield's adm'r et als.*, 9 Grat. 708.

27. Some of the emancipated slaves are not to be sold for the payment of debts, but all should be hired out or sold for a time, in order to raise a sum sufficient for that purpose. *Ibid.*

28. The purchasers of the emancipated slaves under executions being *bona fide* purchasers, are entitled to recover back from the estate of the testatrix, the amount paid by them with interest, and the expense of keeping the chargeable negroes, they accounting for the profits of the negroes purchased by them. *Ibid.*

29. The owner of slaves in Virginia, took them with him to New York in November, 1831, with the intention to emancipate them, and whilst there

he executed a deed of emancipation, attested by one witness. After remaining in New York a few days, he returned to Virginia, bringing the negroes with him, and ever after during his life he treated them as free persons. **Held:** 1st. The owner of the slaves having taken them to New York for the purpose of emancipating them, they were by the laws of New York free; and so continued after their return to Virginia. 2d. The acts of the owner of the slaves were not such a fraud upon the laws of Virginia, as rendered his acts null and of no effect. *Foster's adm'r v. Fosters*, 10 Grat. 485.

30. The fact that slaves are on the premises of a person who makes no claim to them, his infant daughter who claims them living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them. *B. Staton v. Pittman, sheriff*, 11 Grat. 99. *Pittman, sheriff, v. R. Staton. Id.*

31. A conveyance of land and slaves upon a trust to permit the slaves to live upon the land, and take the profits of the land, and their own labour to their own use, they still continuing to be slaves, is null and void, and passes nothing. *Smith's adm'r v. Betty and others*, 11 Grat. 752. *Same v. Thurman and others. Id.*

---

### SPECIAL COURT OF APPEALS.

1. The act of March 31st, 1848, Sess. Acts, p. 51, establishing a special court of appeals, constituted of judges of the circuit courts, is constitutional. *Sharpe v. Robertson*, 5 Grat. 518.

2. A *per diem* compensation to the judges holding the special court of appeals for the time they sit therein, in addition to their salaries as judges of the circuit courts, is constitutional. *Ibid.*

3. The special court of appeals is not a supreme court of appeals, but belongs to the class of superior courts, provided for in the constitution of Virginia. *Ibid.*

---

### SPECIAL TERM.

A notice on a forfeited forthcoming bond to a regular term of a court which is not held, will authorize an award of execution thereon, at a special term, held under § 17, Act, Sup. Rev. Code, 1819, p. 141. *Wootten v. Bragg*, 1 Grat. 1.

---

### SPECIAL VERDICT.

1. A special verdict, in a writ of right, between coparceners or tenants

in common, where the defence is the statute of limitations, must find either an actual disseisin or ouster of the demandants or of those under whom they claim or facts, which in law, constitute such actual disseisin or ouster. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

2. Though a great lapse of time and other circumstances may warrant the presumption of a disseisin or ouster, by one coparcener or tenant in common of another, not labouring under disabilities, this presumption is a matter of evidence for the consideration of the jury, and not a matter of law for the judgment of the court on a special verdict. *Ibid.*

---

### SPECIFIC PERFORMANCE.

1. The assignee for value of a note given for the purchase money of land, may maintain a suit against his assignor, the vendor, and the vendee, for a specific execution of the contract, in a case proper for such relief, and subject the land to the satisfaction of his claim. *Hanna v. Wilson*, 3 Grat. 243. *Kniseley v. Williams et als., id.* 265.

2. Specific performance will not be decreed until the vendor establishes his title at law against an adverse claimant under whom the vendee is in possession. *Carrington et als v. Otis et als.,* 4 Grat. 235.

3. Ejectment by vendor against vendee who is in possession under another title, in order to establish vendor's title, and recovery will be no bar to a specific performance at the suit of the vendor. *Ibid.*

4. The application for a specific execution of a contract is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with the contract on his part; and the prayer will not be granted if it would be inequitable towards the other party. *Bowles v. Woodson*, 6 Grat. 78.

5. Upon a contract for the sale of land, the vendee pays a part of the purchase money, and fails to comply further, though required to do so by the vendor, who, on such failure, disclaims the contract, but refuses to pay back the purchase money paid. Six years after, the vendee seeks to enforce the contract. This is refused; but he is entitled to have the money he has paid returned to him. *Ibid.*

6. Upon a contract for the exchange of land, a deed executed by one of the parties, conveying his land to the other, though not delivered, is a sufficient memorandum in writing, to bind the grantor under the statute of frauds. *Parrill v. McKinley*, 9 Grat. 1.

7. A parol contract for the exchange of lands partly executed by delivery of possession, and acts of ownership over the land so received into possession, will be specifically enforced in equity. *Ibid.*

8. A bill being filed for the specific execution of a contract for the ex-

change of lands, if it appears in the progress of the cause that the defendant cannot comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract, and for such other relief as under the circumstances he is entitled to. *Ibid.*

9. A bill for the specific execution of the contract between adjoining owners, for keeping open a lane through their land, filed nearly twenty years after the contract against a purchaser under one of the parties without actual notice, and with even doubtful constructive notice, the lane having been closed for a number of years, and the plaintiff having stood by without setting up any claim to the lane when the land was twice sold, and having little or no interest in it, dismissed. *McCue v. Ralston*, 9 Grat. 430.

10. One of two co-parceners contracts to sell a small part of a tract of land, professing to act for both, though without authority, and the other parcener does not consent to the sale. Both co-parceners afterwards convey the whole tract to a grantee having full knowledge of the agreement. The land sold is but a small part either in quantity or value of one moiety of the tract. The grantee will be compelled to perform the agreement. *McKee v. Barley*, 11 Grat. 340.

11. A vendor having but an equitable title and only selling his interest in the property, without warranty, and authorizing the vendee to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him. *Bailey v. James*, 11 Grat. 468.

---

## STATUTES CONSTRUED.

1. The act concerning special courts, Sup. Rev. Code, ch. 109, § 17, p. 141, construed. *Wootten v. Bragg*, 1 Grat. 1.

2. The act concerning commissioners of executors, &c., Sup. Rev. Code, ch. 158, § 8, p. 117, construed. *Turner v. Turner's adm'r*, 1 Grat. 11.

3. The act concerning issues of *devisavit vel non*, 1 Rev. Code, ch. 104, § 13, p. 378, construed. *Coalter's ex'or v. Bryan and wife et als.*, 1 Grat. 18.

4. The act concerning attachments, 1 Rev. Code, ch. 123, §§ 1, 5, p. 474, construed. *Hairston v. Medley*, 1 Grat. 96.

5. The act concerning pleas and demurrers in chancery, 1 Rev. Code, ch. 66, § 98, p. 215, construed. *North-western Bank v. Nelsen*, 1 Grat. 108.

6. The act concerning the emancipation of slaves, 1 Rev. Code, ch. 111, § 53, p. 433, construed. *Phæbe v. Bogges*, 1 Grat. 129.

7. The act forbidding sheriffs to purchase land sold for taxes, Sessions Acts, 1813-14, ch. 3, § 29, p. 22, construed. *Taylor's devisees v. Stringer*, 1 Grat. 158.

8. The act authorizing action on the bonds of executors and administrators, 1 Rev. Code, ch. 104, § 63, p. 390, construed. *Bush v. Beale* 1 Grat. 229.

9. The act concerning indemnifying bonds, 1 Rev. Code, ch. 134, § 27, p. 533, construed. *Aylett v. Roane*, 1 Grat. 282.

10. The act concerning appeals, Sup. Rev. Code, ch. 109, § 31, p. 146, construed. *Commonwealth v. Moore's adm'r*, 1 Grat. 294.

11. The act concerning the recording of deeds, 5 Stat. at Large, ch. 1, § 4, p. 409, construed. *Thomas v. Gaines*, 1 Grat. 347.

12. The act for limiting actions against fiduciaries, Sup. Rev. Code, ch. 200, § 1, p. 260, construed. *Cookus v. Peyton's ex'or*, 1 Grat. 436.

13. The act concerning costs in prosecutions for misdemeanors, Sess. Acts, 1823, ch. 9, § 6, p. 12, construed. *St. Clair's case*, 1 Grat. 556.

14. The act concerning the auditor and treasurer, 2 Rev. Code, ch. 174, § 14, p. 4, construed. *Wilson et als. v. Burfoot, treasurer*, 2 Grat. 134.

15. The act concerning sheriffs, 1 Rev. Code, ch. 78, § 13, p. 279, construed. *Governor for, &c., v. McCulloch et als.*, 2 Grat. 175.

16. The act concerning conveyances, 1 Rev. Code, ch. 99, § 4, p. 362, construed. *McClure v. Thistle's ex'ors*, 2 Grat. 182.

17. The act concerning descents, 1 Rev. Code, ch. 96, § 19, p. 357, construed. *Ash v. Way's adm'rs et als.*, 2 Grat. 203.

18. The act concerning conveyances, 1 Rev. Code, ch. 99, § 6, construed. *Pollard's heirs v. Lively*, 2 Grat. 216.

19. The Constitution of Virginia, Sup. Rev. Code, art. 3, § 11, p. 20, construed. *Beach v. Trudgain et als.*, 2 Grat. 219.

20. The act concerning gaming, 1 Rev. Code, ch. 147, § 1, p. 561, construed. *Machir v. Moore*, 2 Grat. 257.

21. The act concerning partitions, &c., 1 Rev. Code, ch. 98, § 1, p. 359, construed. *Otley v. McAlpine's heirs*, 2 Grat. 340.

22. The act concerning divorces, Sup. Rev. Code, ch. 165, § 3, p. 222, construed. *Jennings et als. v. Montague*, 2 Grat. 350.

23. The act concerning officers, soldiers, sailors, and marines, 10 Hen. Stat. ch. 6, p. 25, construed. *Slaughter's adm'r v. The Commonwealth*, 2 Grat. 391. *Commonwealth v. Peyton's adm'r*. *Id.* 393.

24. The act concerning conveyances, 1 Rev. Code, ch. 99, § 11, p. 364, construed. *Crouch et als. v. Dabney*, 2 Grat. 415.
25. The act concerning conveyances, 1 Rev. Code, ch. 99, § 1, 7, construed. *Horsley et als. v. Garth et als.*, 2 Grat. 471.
26. The act incorporating the Chesapeake and Ohio Canal Company, Sess. Acts, 1823-4, ch. 38, § 15, p. 48, construed. *Chesapeake and Ohio Canal Co. v. Hoyer et als.*, 2 Grat. 511.
27. The acts concerning mills, 2 Rev. Code, ch. 225, §§ 1, 2, 3, 4, 6, p. 225, construed. *Whitworth and wife v. Puckett*, 2 Grat. 528.
28. The act concerning foreign bills of exchange, Sup. Rev. ch. 199, § 2, p. 259, and the act concerning affidavits of notaries, Sess. Acts, 1833-4, ch. 62, § 1, p. 75, construed. *Walker v. Turner*, 2 Grat. 534.
29. The act concerning Sabbath-breakers, &c., 1 Rev. Code, ch. 141, § 6, p. 555, construed. *Jones' case*, 2 Grat. 555.
30. The act concerning errors in criminal proceedings, Sess. Acts, 1844-5, ch. 70, § 1, p. 59, construed. *Nemo's case*, 2 Grat. 558.
31. The act concerning the penitentiary, 1 Rev. Code, ch. 171, § 58, 60, construed. *Johnson's case*, 2 Grat. 581.
32. The act concerning slaves, free negroes and mulattoes, 1 Rev. Code, ch. 111, § 30, p. 428, construed. *Peas' case*, 2 Grat. 629.
33. The circuit court law as to special pleas in equitable defences, Sup. Rev. Code, p. 157, § 62, construed. *Murray, Caldwell & Co. v. Pennington*, 3 Grat. 91. *Pence for, &c., v. Huston's ex'ors*, 6 Grat. 304.
34. The act 1 Rev. Code, ch. 111, § 51, p. 432, concerning gifts of slaves, construed. *Anglin v. Bottom*, 3 Grat. 1.
35. The act 1 Rev. Code, ch. 99, p. 361, concerning fraudulent conveyances, considered. *Hunters v. Waite*, 3 Grat. 26.
36. The act 1 Rev. Code, 123, § 4, p. 476, concerning proceedings against absent debtors, construed. *Roote's ex'x v. Tompkins' trustees*, 3 Grat. 98.
37. The act Sup. Rev. Code, ch. 206, p. 265, dispensing with proof of hand-writing in certain cases, construed. *Kelly v. Paul*, 3 Grat. 191. *Shepherd, Hunter & Co. v. Frys. Id.* 442.
38. The act February 13th, 1837, Sess. Acts of 1836-7, ch. 84, § 17, in relation to liens by corporations, construed. *Burr's ex'ors et als. v. McDonald et als.*, 3 Grat. 215.
39. The act of March 19th, 1839, Sess. Acts, ch. 66, § 4, dispensing with

pro of partnership in certain cases, construed. *Shepherd, Hunter & Co. v. Frys*, 3 Grat. 442.

40. The act Sup. Rev. Code, ch. 109, § 30, which authorizes appeals as of right in certain cases from the county to the superior courts, construed. *Atkinson v. Christian*, 3 Grat. 448. *Trevilian v. Louisa Railroad Company*, *Id.* 326. *Hancock v. Richmond & Petersburg Railroad Company*, *Id.* 328.

41. The act 1 Rev. Code, ch. 104, § 21, 35, 41, concerning the grant of administration, construed. *Atkinson v. Christian*, 3 Grat. 448.

42. The act of February 24th, 1846, Sess. Acts, p. 62, concerning juries, construed. *Day's case*, 3 Grat. 629. *McWhirt's case*, *Id.* 594. *Perry's case*, *Id.* 632.

43. The act, 1 Rev. Code, ch. 169, § 2, p. 599, concerning bail in criminal cases, construed. *Hamlett et als. v. Commonwealth*, 3 Grat. 82. *Saunders' adm'r v. Commonwealth*, *Id.* 214.

44. Act 1 Rev. Code, ch. 128, § 5, p. 489, concerning limitations on judgments, construed. *Braxton v. Wood's adm'r*, 4 Grat. 25. *Smith's adm'r v. Charlton's adm'r*, 7 Grat. 425.

45. Act 1 Rev. Code, ch. 104, § 11, p. 377, in relation to proof of wills, construed. *Croft et als. v. Croft's ex'or, &c.*, 4 Grat. 103.

46. Act Sup. Rev. Code, ch. 109, § 31, concerning limitation on appeals, construed. *Williamson v. Gayle et als.*, 4 Grat. 180.

47. Acts 1 Rev. Code, ch. 28, § 4, and ch. 71, § 3, in relation to oaths, construed. *Frederick Justices v. Bruce et als.*, 4 Grat. 281.

48. Act of March 5th, 1846, in relation to public schools, construed. *Literary Fund v. Dalby*, 4 Grat. 528.

49. Act Sup. Rev. Code, ch. 109, § 32, in relation to damages upon decrees affirmed on appeal, construed. *Mulliday v. Machir's adm'r*, 4 Grat. 1.

50. Act 1 Rev. Code, ch. 118, § 1, p. 468, concerning the recovery of damages for mesne profits in writs of right, construed. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

51. Act, 1 Rev. Code, § 12, p. 275, in relation to the administering oaths by clerks, construed. *Matthew Williamson's case*, 4 Grat. 554.

52. Act, 2 Rev. Code, ch. 248, § 8, in relation to the navigation of the upper James river, construed. *Smith's case*, 4 Grat. 532.

53. The act 1 Rev. Code, ch. 99, § 7, p. 363, concerning acknowledgment of deeds, construed. *Shanks et als. v. Lancaster*, 5 Grat. 110.



54. The act 1 Rev. Code, ch. 99, § 15, p. 365, concerning privy examination of *feme*, construed. *Ibid*.
55. The act of March 22, 1857, Sess. Acts, p. 57, concerning appointment of bank directors, construed. *Bank of Virginia v. Robinson*, 5 Grat. 174.
56. The act Sup. Rev. Code, ch. 109, § 43, p. 152, concerning damages on injunctions, construed. *Jeter v. Langhorne*, 5 Grat. 193.
57. The act of April 6th, 1839, § 3, Sess. Acts, p. 51, concerning binding out poor children, construed. *Brewer v. Harris*, 5 Grat. 285.
58. The act of February 23d, 1835, Sess. Acts 1834-5, p. 82, in relation to the Upper Appomattox Company, construed. *Nash v. Upper Appomattox Company*, 5 Grat. 332.
59. The act 1 Rev. Code, ch. 101, § 2, p. 272, concerning fraudulent loans, construed. *McKenzie et als. v. Macon*, 5 Grat. 379.
60. The act 1 Rev. Code, ch. 99, § 21, p. 368, concerning warranties, construed. *Norman's ex'x v. Cunningham and wife et als.*, 5 Grat. 64.
61. The act of March 31st, 1848, Sess. Acts, p. 51, concerning the special court of appeals, construed. *Sharp v. Robertson.*, 5 Grat. 518.
62. The act, Sup. R. C., ch. 226, concerning willful trespasses, construed, *Ratliffe's case*, 5 Grat. 657.
63. The act, 1 R. C., ch. 160, § 4, p. 587, construed. *Howell's case*, 5 Grat. 664.
64. The act of March 7th, 1834, Sess. Acts, p. 7, construed. *Peer's case*. 5 Grat. 674.
65. The act of March, 1840, Sess. Acts, ch. 2, concerning sales of spirituous liquors without license, construed. *Hill's case*, 5 Grat. 682.
66. The act, 1 Rev. Code, ch. 111, § 13, concerning the allowing more than five slaves to remain on premises at one time, construed. *Foster's case*, 5 Grat. 695.
67. The act, Sup. Rev. Code, p. 130, in relation to answers in chancery, construed. *Bowles v. Woodson*, 6 Grat. 78. *Reynolds v. Bank of Virginia et als.*, *id.* 174.
68. The act, Sup. Rev. Code, ch. 104, p. 153, in relation to the Northwest Turnpike Road, construed. *Dunnington's v. President and Directors N. W. Turnpike Road*, 6 Grat. 160.
69. The act 1 Rev. Code, ch. 115, § 7, 8, in relation to warrants of unlawful detainer, construed. *Harmans v. Odell*, 6 Grat. 207.

70. The acts, 1 Rev. Code, p. 409-10, and Sup. Rev. Code, p. 134, in relation to the sale of infant's lands, construed. *Talley et als. v. Starke's adm'r et als.*, 6 Grat. 339.

71. The act of 1839-40, Sess. Acts, p. 47, in relation to the appointment of guardians *ad litem*, construed. *Ibid.*

72. The act, 1 Rev. Code, p. 545, § 55, in relation to executions upon decrees construed. *Shakelford v. Apperson*, 6 Grat. 451.

73. The act, 1 Rev. Code, ch. 111, § 48, in relation to life tenants removing slaves from the State, construed. *Poindexter, &c. v. Davis et als.*, 6 Grat. 481.

74. The act of March, 1832, Sup. Rev. Code, ch. 143, in relation to special courts of appeals, construed. *Allen v. The Commonwealth*, 6 Grat. 529.

75. The act of the 14th March, 1848, Sess. Acts, ch 4, § 15, in relation to grand larceny construed. *Lanthrop's case*, 6 Grat. 671.

76. The act of 1848, Sess. Acts, ch. 11, § 12, in relation to attempts to commit offences, construed. *Uhl et als.' case*, 6 Grat. 706.

77. The act, Code, ch. 51, § 1, p. 660, as to private and local acts, construed. *Somerville v. Wimbish*, 7 Grat. 205.

78. The act limiting appeals to the court of appeals to \$200, construed. *McGruder v. Lyons*, 7 Grat. 233.

79. The act, Code, ch. 182, § 17, p. 686, for limitations of appeals, construed. *Yarborough and wife v. Deshazo*, 7 Grat. 374.

80. The act, Code, ch. 16, § 18, p. 101, and ch. 216, § 2, p. 800, as to suits pending when the Code went into effect, construed. *Ibid.*

81. The proviso in the act, the Code, ch. 149, § 19, p. 594, for limitation of suits, construed. *Ibid.*

82. The acts, 1 Rev. Code, ch. 128, § 65, p. 505. and the act, Sup. Rev. Code, ch. 192, § 2, in relation to *scire facias* to revive judgments, construed. *Williamson v. Crawford*, 7 Grat. 202.

83. The act, Sess. Act. 1847-8, ch. 27, § 2, p. 164, repealing prior acts construed. *Cregor's case*, 7 Grat. 591.

84. The act of 1792, ch. 90, § 5, 1 Stat. at Large, N. S., p. 85, regulating conveyances, construed. *Cales v. Miller et als.*, 8 Grat. 6.

85. The act, Code of 1849, ch. 182, § 2, p. 687, regulating the jurisdiction of the court of appeals, construed. *Clark v. Brown*, 8 Grat. 549.

86. The act of 1847-8, ch. 4, § 7, p. 99, in relation to the malicious burning of a house, construed. *Erskine's case*, 8 Grat. 624.

87. The same statute, § 6, in relation to the malicious burning of stacks of wheat, &c., construed. *Ibid.*
88. The act, Code of 1849, ch. 207, § 13, p. 770, as to a prisoner's right to be discharged, if not indicted within two terms after his examination, construed. *Bell's case*, 8 Grat. 661.
89. The act, Code of 1849, ch. 208, § 36, p. 778, as to a prisoner's right to be discharged from the prosecution if not tried within three terms, construed. *Adcock's case*, 8 Grat. 661.
90. The act, Code of 1849, ch. 199, § 16, p. 751, as to proceedings if a prisoner is acquitted for a variance, construed. *Ibid.*
91. The act, Code of 1849, ch. 209, § 17, p. 781, limiting imprisonment in case of fines, construed. *Webster's case*, 8 Grat. 702.
92. In the construction of the statutes in relation to the turnpike over Price's Mountain, all the attendant and surrounding circumstances taken into consideration. *Price's heirs v. Price's adm'r.*, 9 Grat. 45.
93. The act, Code, p. 681, § 5, 6, as to correction of clerical errors, construed. *Tyree et als. v. Donnally*, 9 Grat. 64.
94. The act, Code, p. 613, in relation to the writ of *habeas corpus*, construed. *Armstrong v. Stone and wife*, 9 Grat. 102.
95. The charter of the Northwestern Bank of Virginia, construed. *Hays v. Northwestern Bank of Virginia*, 9 Grat. 127.
96. The act, 1 Rev. Code of 1819, ch. 104, § 52, p. 388, in relation to sheriff's administrators, construed. *Mosby's adm'r et als. v. Mosby's adm'r.*, 9 Grat. 584.
97. The act Code, ch. 208, § 4, 9, 10, in relation to jurors, construed. *Dowdy's case*, 9 Grat. 727.
98. The act Code, ch. 199, § 25, p. 752, in relation to additional punishment for a second offence in felony, construed. *Rand's case*, 9 Grat. 738.
99. The act Code, ch. 208, § 34, p. 778, in relation to several counts in an indictment, construed. *Ibid.*
100. The act, Code of 1849, ch. 199, § 25, p. 729, which inflicts the additional punishment of five years' imprisonment on a second conviction for felony, applies to the case of a prisoner who had been convicted and sentenced previous to the passage of the act. *Ibid.*
101. The act does not apply to the case of a conviction for an offence committed after the commission of that for which the prisoner is on trial. *Ibid.*
102. The act of January 30th, 1834, Sess. Acts, p. 97, held not to apply

to inquests in cases of public landings. *Muir v. Falconer et al.*, 10 Grat. 12.

103. The act, 1 Rev. Code, ch. 104, § 7, p. 377, in relation to nuncupative wills, construed. *Nowlin's adm'r et als. v. Scott*, 10 Grat. 64.

104. The act, Code, ch. 124, § 1, p. 526, in relation to partition, construed. *Currin et als. v. Spraul et als.*, 10 Grat. 145.

105. The act, Code, ch. 216, § 2, p. 800, repealing previous laws, construed. *Ibid.*

106. The act, Sup. Rev. Code, p. 152, § 44, in relation to granting injunctions, construed. *Jaynes et als. v. Brock*, 10 Grat. 211.

107. The act, Sess. Acts, 1844, ch. 70, p. 54, in relation to pleading usury, construed. *Hope v. Smith, sheriff*, 10 Grat. 221.

108. The act of March 8, 1826, Sup. Rev. Code, p. 260, in relation to the limitations of actions, construed. *Schultz v. Schultz et als.*, 10 Grat. 358.

109. The act of March 23d, 1836, in relation to forfeiture of land to the Commonwealth, construed. *Staats v. Board*, 10 Grat. 400. *Wild's lessee v. Serpell, id.* 405.

110. The act, of March 30, 1837, Sess. Acts, p. 9, in relation to forfeited lands, construed. *Ibid.*

111. The act of February 27th, 1835, Sess. Acts, p. 7, in relation to forfeiture of lands, construed. *Ibid.*

112. The act of March 18, 1841, Sess. Acts, p. 31, in relation to the forfeiture of lands, construed. *Ibid.*

113. The act of March 22d, 1842, Sess. Acts, p. 13, in relation to forfeiture of lands, construed. *Ibid.*

114. The act of March 5th, 1836, Sess. Acts, p. 7, in relation to forfeited land, construed. *Hale v. Branscum*, 10 Grat. 418.

115. The act of December 12th, 1792, as amended by the act of December 26th, 1794, 1 Rev. Code, Pleasants' Ed., 1814, p. 218, in relation to the registry of deeds, construed. *Smith et al. v. Chapman*, 10 Grat. 445.

116. The act of March 30th, 1837, Sess. Acts, p. 11, concerning Western land titles, construed. *Ibid.*

117. The act of February 27th, 1837, in relation to the sale of forfeited lands, construed. *Ibid.*

118. The act of March 15th, 1828, Sess. Acts, p. 19, in relation to forfeited lands, construed. *Ibid.*

119. The act, 1 Rev. Code of 1819, ch. 136, § 3, in relation to remedies against sheriffs, construed. *Stone v. Wilson*, 10 Grat. 529.

120. The act, 1 Rev. Code, of 1819, ch. 134, § 48, in relation to remedies against sheriffs, construed. *Ibid.*

121. The act of March 3d, 1843. Sess. Acts, 1842-3, p. 51, in relation to docketing judgments, construed. *McCance v. Taylor*, 10 Grat. 580.

122. The act, 1 Rev. Code of 1819, ch. 96, § 20, Sup. Rev. Code, ch. 149, § 2 in relation to sales of lands under \$300, construed. *Parker et als. v. McCoy et als.*, 10 Grat. 594.

123. The act, 1 Rev. Code of 1819. p. 209, § 61, in relation to damages upon dissolution of an injunction, construed. *Michaux's adm'r v. Brown et als.*, 10 Grat. 612.

124. The act of March 31st, 1851, Sess. Acts, p. 36, authorizing a plaintiff to require security in certain cases, construed. *Levy v. Arnsthall*, 10 Grat. 641.

125. The act of April 16th, 1852, Sess. Acts, ch. 92, § 4, p. 77, authorizing plaintiff to file interrogatories to defendant, construed. *Ibid.*

126. The act of June 5th, 1853, Sess. Acts, p. 53, § 2, in relation to the jurisdiction of the supreme and district courts of appeals, construed. *Barnett v. Meredith, Judge*, 10 Grat. 650.

127. The constitution of Virginia in relation to the jurisdiction of the court of appeals, construed. *Ibid.*

128. The act Code, p. 783, § 11, in relation to costs in criminal cases, construed. *Anglea v. Commonwealth*, 10 Grat. 696.

129. The act, Code, p. 770, § 10 and 11, in relation to criminal pleadings, construed, *Laziers' case*, 10 Grat. 708.

130. The act Code, p. 752, § 21, in relation to persons jointly indicted, construed. *Ibid.*

131. The Constitution of Virginia, article 6, § 7, in relation to the circuit courts, construed. *Scott's case*, 10 Grat. 749.

132. The act, Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, construed. *Parramore v. Taylor*, 11 Grat. 220.

133. The act, 1 Rev. Code, 1819, ch. 128, § 103, p. 511, in relation to jeofails, construed. *Boyle's adm'r v. Overby*, 11 Grat. 202.

134. The act, 1 Rev. Code, 1819, ch. 113, § 13, p. 449, in relation to rents, construed. *Brooks v. Wilcox*, 11 Grat. 411.

135. The act of March 2, Sess. Acts, of 1827, ch. 27, § 3, p. 26, in relation to interest on rents, construed. *Ibid.*

136. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing Commonwealth's right to forfeited lands, construed. *Levasser v. Washburn*, 11 Grat. 572.

137. The act of March 28th, 1843, Sess. Acts, ch. 9, § 4, p. 17, in relation to the removal of causes, construed. *Harrison v. Middleton*, 11 Grat. 527. *Kincheloe v. Tracewells*, *id.* 587.

138. The Act of April 3d, 1852, Sess. Acts, ch. 95, § 1, p. 78, in relation to remedies against absent debtors, construed. *O'Brien et als. v. Stephens et als.*, 11 Grat. 610.

139. The act, 1 Rev. Code, 1819, p. 475-6, § 4, in relation to decrees against absent defendants, construed. *Evans et al v. Spurgin et als.*, 11 Grat. 615.

140. The act Code, ch. 96, § 3, p. 443, in relation to ordinaries, construed. *Yeager, ex parte*, 11 Grat. 655.

141. The act Code, ch. 38, § 18, p. 209, in relation to selling ardent spirits, construed. *Head's case*, 11 Grat. 819.

142. The act Code, ch. 181, § 5, p. 681, in relation to amendments, construed. *Powell's case*, 11 Grat. 822.

143. The act Codo, ch. 193, § 5, p. 733, in relation to forgeries, construed. *Ibid.*

---

## SUBSCRIPTIONS.

1. A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in the subscription paper, these terms are themselves conditions, which must be complied with, before the subscription is binding. *Gates ex'or et als. v. Swain*, 9 Grat. 633.

2. To make a subscription binding, it must be acceded to and the party must be apprised that his offer is accepted; and this must be done in a reasonable time. *Ibid.*

3. A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party making it or of loss to the other party. *Ibid.*

4. If a subscription be acceded to, in the terms in which it is made, and labor and money are expended on the faith thereof, the party making the subscription is bound thereby. *Ibid.*

## SUBSTITUTION.

1. One partner, in a farming partnership, executes his bond for the rent agreed to be paid. This is paid afterwards out of the partnership effects. Creditors of the partnership have no right to be substituted to the obligee in the bond, for the satisfaction of their debts. *Christian v. Ellis et als.*, 1 Grat 396.

2. A surety in a forthcoming bond, when he discharges the debt, is entitled to be substituted to the remedies of the creditor against all the original debtors. *Robinson et als. v. Sherman et als.*, 2 Grat 178.

3. Upon a judgment against principal and surety, a *ca. sa.* issues which is served upon the surety, who thereupon delivers property and executes a forthcoming bond, which is forfeited. The surety in the forthcoming bond then pays the debt. He is entitled to be substituted to the creditors remedies against the land of the principal debtor; and this, though the land had come into the hands of a *bona fide* purchaser, without notice, before the levy of the *ca. sa.* *Leake v. Fergusson*, 2 Grat. 419.

4. But he is not entitled as against a surety for the original debt. *Ibid.*

5. The lien of an execution which is not enforced by sale, expires with authority to sell and a surety who pays the debt, can not be substituted to it. *Carr's adm'rs v. Glasscock's adm'r et als.*, 3 Grat. 343.

6. Surety in an injunction bond, given on enjoining a judgment, by the debtor, having discharged the judgment, is entitled to be substituted to the judgment lien. *Rogers v. M'Luers adm'rs et als.*, 4 Grat. 81

7. A testator subjects his land to the payment of his debts. A bill is filed by a creditor against the executor to subject the land, to which the devisees are not parties and there is a decree and sale, and a conveyance which is confirmed. The decree not binding the devisees, they recover the land: The purchaser having bought in good faith is entitled to be substituted to the rights of the creditor, and to charge the land to the amount of the debt paid by him. *Hudgin v. Hudgin's ex'or et als.*, 6 Grat. 320.

8. The balance of the purchase money after paying the debt, having been paid to the executor, and he being in advance to the estate on the close of his administration, the purchaser is entitled to subject the land for the amount the executor was so in advance. *Ibid.*

9. The rents and profits received by the purchaser, whilst in possession of the land, are to be deducted from the amount for which he is entitled to charge it, and he should have a decree charging it for the balance. *Ibid.*

10. A principal executes a bond binding his heirs to his surety as endorser, with condition that he will, when requested by the bank or the surety, pay off the notes, and so indemnify and save the surety harmless, and he

dies leaving the notes not yet due, which are protested as they fall due, and are afterwards paid by his administrator. The surety being entitled to resort to both the real and personal estate, and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled, to the extent of the notes so paid, if they do not exceed the penalty of the bond. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

11. There are three principal obligors in a bond; and two of them put money, in the hands of the third to pay it and he undertakes to pay it. As between themselves, the two are entitled to be substituted to the lien of a judgment upon the land of the third, recovered against the three, and so against purchasers from the third, who do not show a better equity. *Buchan v. Clarke et als.*, 10 Grat. 164.

12. Before the judgment, one half of the land has been purchased and payments made upon it, and after the judgment, the purchaser gave up the land and took a deed of trust upon it for the amount of his payments. The taking the deed of trust, merged any prior equity he might have had and the judgment has preference to his deed of trust. *Ibid.*

13. W administrator of G assigns the bond of T to the executors of H in discharge of a debt due from G to H. The executors sue T and recover a judgment, and he enjoins it on the ground that G owed him for a legacy left him by R, of whom G was the executor, and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W. *Braxton's adm'r &c. v. Harrison's ex'ors.*, 11 Grat. 30.

See SURETIES.

---

## SUPREME COURT OF APPEALS.

The supreme court of appeals has no jurisdiction either under the constitution or the statute, to issue a *mandamus* to a judge of a circuit court to compel him to try a cause pending in his court. *Barnett v. Meredith, judge*, 10 Grat. 650.

---

## SURETIES.

1. In a suit against an administrator and the administrator of his surety, his administration account is settled. Sureties of the second administrator being afterwards made, parties are not entitled to have the account of the first administrator resettled. *Cookus v. Peyton's ex'or.*, 1 Grat. 431.

2. Letter directed by B to S, in which he says, "I authorize you and O B to use my name as endorser." This is a joint power to be jointly exercised. *Union Bank of Maryland v. Beirne*, 1 Grat. 226.



3. Under this power S endorses the name of B upon his bills, without its appearing to be done by an agent. After some of these bills had been protested, B wrote at the foot of the letter, "the above is my signature, the legal liabilities of which I acknowledge." S again endorses the name of B on other bills in the same manner. B not liable on these endorsements. *Ibid.*

4. A power of attorney giving authority to endorse the name of the principal, construed. *Bank of U. S. v. Beirne et als.*, 1 Grat. 234.

5. Upon a decree *de bonis testatoris* and a return of *nulla bona*, an action may be brought against the sureties of an executor, upon his official bond. *Bush v. Beale*, 1 Grat. 229.

6. The penalty of a guardian's bond being blank, it is void as to the sureties, nor can it be held to be a covenant and thus bind them. *Austin v. Richardson*, 1 Grat. 310.

7. It is not necessary that the public moneys should be auditted to render the treasurer's sureties responsible for his wasting it. *Wilson et als v. Burfoot, treasurer*, 2 Grat. 134.

8. A surety in a forthcoming bond is a surety for the debt. *Robinson et als. v. Sherman et als.*, 2 Grat. 178.

9. A surety in a forthcoming bond, when he discharges the debt, is entitled to be substituted to the remedies of the creditor against all the original debtors. *Ibid.*

10. He may recover from them, principal, interest and cost of the original judgment, but not the costs of the forthcoming bond. *Ibid.*

11. The original debtors are each bound for the whole amount of the debt, to the surety in the forthcoming bond who discharges it. *Ibid.*

12. A principal debtor in a judgment obtained an injunction thereto, and executed an injunction bond with a third person as surety. The surety in the judgment being no party to the injunction. Upon the dissolution of the injunction, the surety in the injunction is liable for the debt enjoined, before the surety in the judgment. *Bentley et als. v. Harris' adm'r.*, 2 Grat. 357.

13. A surety in an injunction bond being held insufficient and another bond with other sureties being executed, upon a dissolution of the injunction, the sureties in both bonds equally bound. *Ibid.*

14. One of these sureties executes a *ne exeat* bond with a surety and conveys a tract of land to indemnify him, the land is previously liable as between the sureties for his proportion of the judgment enjoined, and his surety is liable for the balance. *Ibid.*

15. A court of equity will enforce against sureties a decree obtained in a previous suit against the executor. *Hobson v. Yancey et als.*, 2 Grat. 73.

16. A decree founded on an account taken in a cause in which sureties were not parties is not conclusive upon them. *Ibid.*

17. Until a contingent legacy is payable, executor cannot relieve himself or sureties, by paying it over to guardian of legatee. *Sharpe v. Chambers*, 2 Grat. 319.

18. A surety in a forthcoming bond, executed by a surety in the original judgment, is entitled on paying the debt to be substituted to the remedies of the creditor against the principal debtor. *Leake v. Fergusson*, 2 Grat. 419.

19. He is not entitled to be substituted to the remedies of the creditor against the original surety. *Ibid.*

20. The surety in a bond is not released by a conditional agreement to give time to the principal without the surety's consent, if the condition is not complied with. *Harnsberger's ex'ors v. Geiger's adm'r.*, 3 Grat. 144.

21. A surety of a guardian is not protected by lapse of time, or the statute of limitations against the claim of the ward who has been prosecuting a suit against the administratrix of the guardian. *Roberts v. Colvin*, 3 Grat. 353.

22. A decree should not be made against the surety of a guardian until the account of the administratrix of the guardian is settled, and an enquiry is directed to ascertain whether any estate, real or personal, of the guardian remains. *Ibid.*

23. A constable is an officer appointed for the whole county; and although he is prohibited by law under penalty, from executing process out of his particular precinct, yet his official acts in any part of the county are valid; and he and his official sureties are responsible therefor. *M'Neale et als. v. Governor for Clark*, 3 Grat. 299.

24. The jurisdiction of the justice in a case against a constable and his sureties, for a failure to pay over money collected on an execution, is not limited to twenty dollars. *Hendricks v. Shoemaker*, 3 Grat. 197.

25. One joint notice to the constable and his sureties upon defaults of the constable in several cases, is sufficient; and the justice should give a separate judgment in each case. *Ibid.*

26. An administration bond not conforming to the requisitions of the statute, and containing no provision for the benefit of creditors, the sureties therein are not liable to creditors. *Roberts v. Colvin*, 3 Grat. 358.

27. Sureties of an executor who qualified prior to the act of 1826, Sup. R. C. p. 215, are not responsible for the proceeds of real estate. *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 133.

23. A surety induced by the fraudulent representations of his principal to become surety, but of which the payee of the note was innocent, has no title to relief against the innocent payee. *Griffeth et als. v. Reynolds*, 4 Grat. 46.

29. A surety in an injunction bond given on enjoining the judgment by the debtor, having discharged the judgment, is entitled to the benefit of the judgment lien. *Rogers v. M'Leur's adm'r et als.*, 4 Grat. 81.

30. One surety of an insolvent principal is entitled to contribution from his co-sureties, add if all the sureties are solvent, each is bound for his equal share. *T. L. Preston v. J. Preston et als.*, 4 Grat. 88.

31. There being a judgment and execution against one surety who gives a forthcoming bond with another joint surety against whom there was no judgment, which forthcoming bond is forfeited, and the surety in this bond pays the debt, he is entitled to contribution from the sureties in the original bond. *Ibid.*

32. If one surety is insolvent, his share is to be apportioned among the solvent sureties. *Ibid.*

33. But the surety in the forthcoming bond having, by executing that bond, released the property of the principal in that bond, and that principal having become insolvent, his surety is not entitled to recover from his co-sureties in the original bond any part of the share of his said principal as one of the sureties in the original bond. *Ibid.*

34. The surety in the forthcoming bond is not entitled to a decree for the costs of awarding execution on said bond, either against the principal or sureties in the original bond, but only against his principal in the forthcoming bond. *Ibid.*

35. The right of one surety to call upon his co-surety for contribution arises from a principal of equity growing out of the relation which the parties have assumed towards each other; the equity springs up at the time of entering into that relation, and is fully consummated when the surety is compelled to pay the debt. *Wayland v. Tucker et als.*, 4 Grat. 267.

35. A surety having executed his bond to a co-surety, who assigns it, and is insolvent, the surety is entitled to have it for contribution in preference to the assignee. *Ibid.*

37. Though judgment has been recovered on his bond, surety may have relief in equity. *Ibid.*

38. A court of equity will not interfere to give relief to a purchaser under a decree of court having jurisdiction of the subject, or to his sureties, for errors in the decree or the proceedings in the cause, where the report of the commissioner has been confirmed. *Worsham v. Hardaway's adm'r.*, 5 Grat. 60.

39. Personal decree against administrator, and then action on bond against sureties, and judgment. The judgment fixes the sufficiency of assets as to them, though the decree against the administrator is reversed. *Mason's ex'or v. Dunn's adm'r.*, 5 Grat. 384.

40. A mere countermand of an execution by a creditor, after it goes into the hands of the sheriff, but before it is levied, does not release a surety of the execution debtor. *Humphrey v. Hill*, 6 Grat. 509.

41. In a suit by the executor of one partner against the executor and sureties of the other partner, under the circumstances, the sureties were not allowed to set up a credit which had been set up by the partner, and again by the executor, and had been disallowed by the court in both cases. *Ross' ex'or v. McLaughlin's adm'r et als.*, 7 Grat. 86. *Same v. Haden's adm'r.*, *id.*

42. The surety of a grantor in a fraudulent conveyance, against whom, and the grantor, a judgment has been recovered, may direct the execution to be levied on the property, and set up the fraud in the conveyance. *Curd v. Miller's ex'ors.*, 7 Grat. 185.

43. A paper signed in blank, and endorsed in blank, may be filled up either as a common promissory note or a negotiable note, and the person who endorsed it in blank will be liable on his endorsement to a holder for value. *Orrick v. Colston*, 7 Grat. 19.

44. In such a case, if the paper is filled up as a common promissory note to a third person who advances the money for it to the makers, he may treat the endorser as an original surety or as a guarantor of the note. *Ibid.*

45. A purchase of bonds from an executor, at a discount of eighteen per cent., with knowledge that the condition of the estate does not require the sale, is a fraud in the purchaser, though he may know that they do not amount to more than the executor's interest in the estate; and the executor not having paid to the other legatees their portion of the estate, the purchaser will be compelled to repay the money to them. *Pinckard v. Woods, &c.*, 8 Grat. 140.

46. If the sureties of the executor have been compelled to pay the amount to the legatees, they may recover from the purchaser. *Ibid.*

47. The official bond of an executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for the rents and profits of the real estate. *Hutcherson, &c. v. Pigg*, 8 Grat. 220.

48. All the sureties of an executrix should be parties to a suit by legatees for the distribution of the estate, or a sufficient excuse shown for not making them parties, before a decree is made against one of them. *Ibid.*

49. A surety whose principal is dead may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt, so as to exonerate the surety from his responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring for a settlement of the administration and account of the assets, whether legal or equitable; but the creditor must be a party, that he may receive the money when it is recovered. *Stephenson v. Taverners*, 9 Grat. 398.

50. A testator gives certain property to his wife for life, and directs that at her death his executors shall sell it and divide it among his children. After the widow's death, the executor sells the property. His sureties are liable for his *devastavit*. *Almond and wife v. Mason's adm'r et als.*, 9 Grat. 700.

51. A levy of an execution having been made in the first year of a high sheriff's term of office, his sureties for that year will be responsible for the failure of the deputy to pay over the money, though it was not received until a *venditioni exponas* issued after the expiration of the high sheriff's term. *Tyree et als. v. Wilson*, 9 Grat. 59.

52. A bond by a deputy sheriff and his sureties to the high sheriff, for the faithful discharge of the deputy's duty, omits, both in the penalty and condition, to designate the name of the deputy. There being nothing on the face of the bond to indicate that all named in the penalty were not appointed deputies, and the obligors having sealed and delivered the bond as it was, they are estopped from denying that they are deputies. *Cox and others v. Thomas's adm'x.*, 9 Grat. 312.

53. Each obligor named in the penalty of the bond must, in such a case, be regarded as principal, so far as his acts are concerned, and the others as his sureties. *Ibid.*

54. On a motion by an administratrix of a high sheriff, against a deputy and his sureties, for failure to pay over money made on execution, the whole record of the cause on the motion against her is not necessary as evidence, but the judgment is sufficient; that and its recitals being *prima facie* evidence against the deputy and his sureties. *Cox et als. v. Thomas's adm'x.*, 9 Grat. 323.

55. If the recovery by the creditor against the administratrix was barred by the statute of limitations, the deputy and his sureties must show it on the motion against them. It must be presumed, in the absence of proof, to be correct. *Ibid.*

56. The judgment of the circuit court against the high sheriff is conclusive of its jurisdiction, unless reversed on appeal; and the deputy and his sureties can not question it on the motion of the administratrix of the high sheriff against them. *Ibid.*

57. A power, with a trust, is vested by will in the executors, and one of them dies and the other is removed, and the estate is committed to the sheriff. The deputy who farmed the sheriffalty gives bond with sureties, with condition to indemnify the high sheriff against all loss and damages which he may sustain in consequence of any failure or misconduct on the part of the deputy, or of any other person whom he may employ to assist him in the office. The high sheriff being liable for the rents received under the power by the deputy, he having undertaken so to receive them, the sureties of the deputy are liable to him for the default of the deputy and his assistant in the office. *Miller v. Jones et als.*, 9 Grat. 584.

58. There are three principal obligors in a bond, and two of them put money in the hands of the third to pay it, and he undertakes to pay it. As between the three, the third is the principal obligor, and the other two are sureties. *Buchanan v. Clarke et als.* 10 Grat. 164.

59. As between themselves the two are entitled to be substituted to the lien of a judgment upon the land of the third, recovered against the three; and so against purchasers from the third who do not show a better equity. *Ibid.*

60. Before the judgment one-half of the land has been purchased and payments made upon it, and after the judgment the purchaser gave up the land and took a deed of trust upon it for the amount of his payments. The taking the deed of trust merged any prior equity he might have had, and the judgment has preference to his deed of trust. *Ibid.*

61. A paper intended to be a bond is signed in blank, as to the sum, by a person as surety, and the blank is afterwards filled up in his absence, and without his knowledge, and without authority from him. It is not his bond. *Rhea v. Gibson's ex'or.*, 10 Grat. 215.

62. A covenant by the holder of a bond with the principal obligor to give a specific time for payment does not release the surety at law. His only remedy is in equity. *Devers v. Ross*, 10 Grat. 252.

63. N, living in Virginia, brought two suits in South Carolina; and B, living there, became his security for costs. N executed to B a bond with sureties living in Virginia to indemnify him. In an action by B against N and his sureties, the records of the suits brought by N in South Carolina were offered by B in evidence, and were objected to on the ground that they showed that B had not become the surety of N at the date of the bond of N and his sureties to him. Held: That the defendants not showing that B was surety of N for costs in any other cases, their bond must be held to refer to these suits; and they were estopped by their bond from denying that B was the surety of N at the time of its execution. *Cordle v. Burch*, 10 Grat. 480.

64. The sureties of a deputy in his bond to the high sheriff for the faithful

discharge of his duties, are estopped from denying that the principal was deputy, unless the bond is invalid. *Cecil v. Early and others*, 10 Grat. 198.

65. The sureties of a public officer are not excluded from the benefit of the bankrupt act of 1841. *Saunders v. The Commonwealth*, 10 Grat. 494.

66. A guardian qualified in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in the payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from his guardian, until 1840, when the guardian becomes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate on his coming of age. Even if the party who had received the bond from the guardian could be held responsible to the ward, he is not responsible to the sureties. *Hunter v. Lawrence's adm'r et al.*, 11 Grat. 111.

67. A surety in a forthcoming bond is a surety for the debt, and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, existing at the time he became bound for the debt, and the judgment for the benefit of the surety so paying, is not extinguished, but is transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate, owned at the date of the judgment or afterwards acquired. *Hill v. Manser et al.*, 11 Grat. 522.

68. The surety in a forthcoming bond pays to the creditor a sum certain, the execution issued on the bond against the principal and himself, and takes a receipt as for money paid by him. The evidence of payment afforded by the receipt, will not be repelled by proof of loose declarations, that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor. *Ibid.*

69. The creditor having taken a deed of trust from the principal debtor to secure the debt, and the debtor having subsequently given another deed of trust upon the same, and other property, to secure debts to a third party, one of which was for money loaned to pay a balance due on the judgment, of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed applied to satisfy the amount he has paid, with interest on so much thereof as went to discharge the principal of the debt, ; and if that property does not discharge it to have the land embraced in the second deed, subjected to discharge the balance. *Ibid.*

---

## SURVEYS.

1. It is not the duty of a surveyor of a county to furnish a warrant, and

make an entry for any person, and a promise by him without consideration to do this, will not entitle the party to an action of *assumpsit* against him. *Hale v. Crow and wife*, 9 Grat. 263.

2. The surveyor is to survey any land that any person may enter and require him to survey, though he knows it has been entered and surveyed previously for another person. *Ibid.*

3. On a survey directed in a cause some of the lines are run when one of the parties acts as chainman. Upon a second survey, another chainman is employed, and all but one of the lines are again run. The line not run, the surveyor says, he ascertains to be correct by other lines run; and the line is submitted to the jury not as a line run, but as a protracted line. This is not error. *Smith et al. v. Chapman*, 10 Grat. 445.

---

### TAX SALES OF LAND.

1. The deed of the collector, made under the act of Congress of the 9th of January, 1815, laying direct taxes, does not furnish *prima facie* evidence of the regularity of the collector's proceedings. *Jesse v. Preston*, 5 Grat. 120. *Keith v. Same, id.*

2. A party claiming title under a deed from the collector of the United States for land sold for the direct tax, must show that everything was done which the law required to be done before making the sale. *Ibid.*

3. The deposition of the collector in general terms, that the sale was made in exact pursuance of the act of Congress, without specifying what was done is not proper evidence of the fact. Evidence of the various proceedings required by law before the sale was made, should be adduced to enable the court to determine upon the facts so proved, whether the authority to sell was properly exercised in the particular case. *Ibid.*

4. In a sale of land for taxes under the act of February 9th, 1814, 2 R. C. 542, by the circumstances of the sale which are to be recited in the deed, is not meant all the steps taken by the various officers, which precede the sale; but the circumstances attending the sale itself, viz: That the sale was made at the time and place prescribed for the sale of lands returned delinquent for non-payment of taxes; if less than the whole lot or tract was sold, how much; who was the purchaser, and the amount of the purchase money. *Flannagan v. Grimmer et als.*, 10 Grat. 421.

5. It is not necessary that the deed shall state that the land had been advertised. *Ibid.*

6. If the deed recites that the land was advertised in a mode that did not conform to the statute, yet as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed. *Ibid.*



7. The deed cannot be questioned by parol proof of the failure to advertise the sale as the law prescribes. *Ibid.*

8. If the deed of the sheriff is defective, it is still competent evidence in ejectment to shew with other oral evidence an actual entry under claim of title and continued holding thereunder, so as to make out a title or right of entry by actual possession. *Ibid.*

9. A party claiming title under a deed from a deputy sheriff for land sold for non-payment of taxes, under the act of February 9th, 1814, must shew that the person described as high sheriff, was such, and the grantor in the deed his deputy. *Hobbs v. Shumates*, 11 Grat. 516.

10. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title, as by law the sheriff was authorized to convey. *Ibid.*

---

## TENANT.

SEE LANDLORD AND TENANT.

---

## TENANT IN COMMON.

1. The possession of one coparcener or tenant in common, being the possession of all, no one, or more, of them, in possession of the whole subject can avail himself, or themselves, of such possession, as a defence under the statute of limitations against the rest, without an actual disseisin or ouster of his or their co-parceners or co-tenants. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

2. A great lapse of time, with other circumstances, may warrant a presumption of disseisin or ouster, by one co-parcener or tenant in common of another not laboring under disabilities. *Ibid.*

3. The payment of taxes on an undivided third of a tract of land, or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, does not constitute an actual ouster by one tenant in common, of his co-tenant. *Hannon et als. v. Hannah*, 9 Grat. 146.

4. *Quære*: If a tenant in common of an undivided interest in land, may not maintain a *caveat* against the issuing of a grant to a third person, upon a survey of part of the land, embraced within the limits of the grant, in which he holds an undivided interest. *Walton v. Hale*, 9 Grat. 194.

## TENDER.

1. A tender of money in payment of a judgment, will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Grat. 592.

2. A tender of money, in payment of a judgment, will not authorize a court of equity to stop an execution issued upon the judgment, where there is neither allegation nor proof that the defendant in the execution kept the money on hand for the discharge of the judgment. *Ibid.*

3. *Quære*: If a court of equity will interfere to arrest an execution on a judgment at law, on the ground that the money had been tendered before the execution was issued? *Ibid.*

## TRESPASS.

1. Trespass *vi et armis* will lie for burning plaintiff's wood lying on defendant's land, by defendant's setting fire to brush on another part of his land, for the purpose of clearing up the land, and with no intent to burn plaintiff's wood. *Jordan v. Wyatt*, 4 Grat. 151.

2. Case will lie also. *Ibid.*

3. A recovery by the landlord in a writ of unlawful detainer and a symbolical delivery of possession by the sheriff, whilst the tenant is in actual possession, will not entitle the party to maintain trespass *quare clausum fregit* against the tenant. There must be a recovery in ejectment against the tenant, or actual possession at the time of the trespass. *Kretzer v. Wysong*, 5 Grat. 9.

4. The breach of a promise by the tenant to deliver the crop growing on the land to the party who recovered, is no trespass. *Ibid.*

5. Trespass *quare clausum fregit* must be brought by the person in the actual possession of the premises at the time of the trespass, if any one holds such actual possession. *Ibid.*

6. In a joint action of trespass against several who plead jointly, if the jury find them guilty jointly, they should assess the damages jointly against all. *Crawford v. Morris*, 5 Grat. 90.

7. If, in such case, the jury, by mistake, assess several damages, the plaintiff may cure the defect by entering a *nolle prosequi* as to all but one, and taking judgment against him. *Ibid.*

8. In such case, it is not correct for the court to instruct the jury that

they may sever in the damages, and assess respectively whatever in their opinion, each party found guilty ought to pay. *Ibid.*

9. In such case, the jury should assess against all who are found guilty, the amount which they think the most guilty ought to pay. *Ibid.*

10. In such case, therefore, an instruction to the jury that they may sever the damages, is not an error of which a defendant can complain in an appellate court, though the plaintiff may. *Ibid.*

11. In trespass *quare clausum fregit*, it is proper to charge that the defendant ejected the plaintiff for a long space of time, viz: from thence hitherto; whereby plaintiff for and during all that time lost, and was deprived of the use and benefit of the said close. *Bailey v. Butcher*, 6 Grat. 144.

12. A joint action of trespass, assault, and battery, lies against husband and wife for a joint assault by both. *Roadcap and wife v. Sipe*, 6 Grat. 213.

13. In such action against husband and wife for a joint assault, there may be a verdict and judgment against one, and in favour of the other. *Ibid.*

14. Though the mere breaking and entering the close of another is not a misdemeanor, yet if that entering is accomplished by circumstances constituting a breach of the peace, it will become a misdemeanor, for which an indictment will lie. *Henderson's case*, 8 Grat. 708.

15. The going upon the porch of another man's house armed, and from thence shooting and killing a dog, of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house, is a misdemeanor for which an indictment will lie. *Ibid.*

16. In an action of trespass, assault, and battery, the plea is "*son assault demesne*," and the replication is, "*de injuria*." It is the plaintiff's right to introduce his evidence first. *Young v. Highland*, 9 Grat. 146.

17. In such a case, if the defendant is permitted to commence and introduce his evidence first, it is still the right of the plaintiff to introduce his evidence to prove the assault and battery charged in the declaration. *Ibid.*

---

## TROVER.

1. Trover lies by one tenant in common of a personal chattel against his co-tenant, for the appropriation of the chattel to his exclusive use, where

the chattel is of a nature to be necessarily destroyed by the use thereof. *Lowe v. Miller*, 3 Grat. 205.

2. K, the owner of a slave for life, in 1836, sells him to M, who in the same year sells him to J, who gives him to a daughter, by whom he is taken out of the State. K dies in 1846, and then the owners of the remainder in the slave bring trover against M, to recover the value thereof. **Held**: The plaintiffs not having had the right to the possession of the slave at the time M sold him, cannot maintain *trover* against M. *Philips et als. v. Martiney's ex'or*, 10 Grat. 333.

3. If the sale by M gave the plaintiffs the right to bring *trover* against M, the action is barred by the statute of limitations. *Ibid*.

---

## TRUSTS.

1. The act, March 8th, 1826, Sup. Rev. Code, ch. 200, § 1, p. 260, for the limitation of actions against trustees and others acting as fiduciaries, only begins to run from the time when the liability sought to be enforced has arisen. *Cookus v. Peyton's ex'or*, 1 Grat. 431.

2. Precatory words will raise a trust, in a will, where the subject and object are certain. *Harrisons v. Harrison's adm'x*, 2 Grat. 1.

3. A purchaser of an equity of redemption in land, having paid off the incumbrance, may have the land sold by the trustee to perfect the title. *Tiffany v. Kent et als.*, 2 Grat. 231.

4. At a sale of an equity of redemption, the incumbrance is stated to be a particular sum, but in fact the debtor is entitled to a credit upon it. *Quære*: If the purchaser is not bound to pay the sum stated? *Ibid*.

5. Property is settled to the separate use of a *feme covert*, for life, with remainder to her children. Before the trustees consent to act, it is agreed between them and the *feme*, that each trustee shall take and hold a moiety of the fund. In pursuance of this agreement, one of the trustees collects the fund, and with the approbation of the *feme*, pays over a moiety thereof to the other trustee, who wastes it and becomes insolvent. The trustee who collected the fund is liable for the whole amount of the fund, and for the interest on the moiety paid over to his co-trustee. *Graham v. Austin et als.*, 2 Grat. 273.

6. The trustees having advanced to the *feme*, more than the interest of the trust fund, up to the time it is taken out of their hands, the interest on one moiety of the fund was applied to reimburse them. *Ibid*.

7. Husband and wife convey the equity of redemption in her land to a trustee, to be sold for the use and benefit of the grantors. They afterwards mortgage the same property; and the wife dies. The land not hav-

ing been sold, the trustee is entitled to hold it against the mortgagee, in satisfaction of debts due to him from the husband, or advances made by him to the husband before the mortgage. *Siter, Price & Co. v. M'Clanahan et als.*, 2 Grat. 280.

8. Parol evidence is not admissible against the mortgagee without notice, to prove that at the time of executing the deed, it was agreed between the parties thereto, that the trustee should hold the property in trust to secure debts due from, and advancements made to the husband. *Ib d.*

9. The trustee being a prior mortgagee of the equity of redemption in the land, cannot tack his debts, due from the husband, to his mortgage as against a subsequent *bona fide* mortgagee. *Ibid.*

10. There is a conveyance on consideration that the grantee will pay the debts of the grantor, which is not executed by the grantee, but accepted by him; the property conveyed whilst in the hands of the grantee, will be subjected to pay the debts of the grantor. *Vanmeter's ex'ors v. Vanmeters*, 3 Grat. 148.

11. On a bill to set up a parol trust attending the purchase of land, the proof shows that the vendor understood and intended the purchase to be upon the trust, but the purchase being by an agent, the proof, though it shows the agent understood the purchase to be on the trust, does not show the vendee so intended. **HELD:** The proof is insufficient to establish the trust. *Harris' ex'ors v. Barnett et als.*, 3 Grat 339.

12. Property having been placed by a principal debtor in the hands of his surety for the purpose of discharging a claim then prosecuting against them, the surety is to be treated as a trustee holding the property for the benefit of the creditor. *Roberts v. Colvin*, 3 Grat. 358.

13. A purchaser from the grantor of land conveyed in trust, taking a conveyance from such grantor and the trustees, has notice of the trust, and is bound to know that the trustees, have no power to sell the land. *Mundy v. Vawter et als.*, 3 Grat. 518.

14. But if the title papers show an interest of but one-fourth in the grantor, such purchaser, without actual notice of the equitable title in the grantor to the other three-fourths, will not be affected thereby. *Ibid.*

15. Property to which a trust has attached, will be subjected to the trust in the hands of a purchaser for value, who has constructive notice of the trust; and this though it was irregular in the trustee to invest the trust fund in the property. *Heth et als. v. Richmond, Fredericksburg & Potomac Railroad Co.*, 4 Grat. 482.

16. Though the deed creating the trust only conveys personal property, yet if this property is converted into land, and the title papers of the purchaser from the trustee show the fact of the conversion, the purchaser will

be held to have notice of the trust, the trust deed having been duly recorded. *Ibid.*

17. Under the circumstances, the relief given to the *cestuis que trust* against the purchasers, was the purchase money, with interest from the time they were entitled to the fund. *Ibid.*

18. A deed of trust executed in part to secure fraudulent debts, but in part to secure a *bona fide* debt, the *bona fide* creditor having no notice of the dishonest purpose on the part of the grantor, is a valid security for the *bona fide* debt. *Billups v. Sears et als.*, 5 Grat. 31.

19. All the persons secured by a deed of trust, either directly or indirectly, if named in it, are necessary parties to a bill assailing the deed as fraudulent as to some of the *cestuis que trust*, and seeking a distribution of the trust fund. *Ibid.*

20. A married woman having given a mortgage on her separate estate, to secure a debt, afterwards obtains a further loan from her creditor. Her trustee will not be allowed to redeem the mortgage, without paying the debt subsequently contracted. *Woodson, trustee, v. Perkins*, 5 Grat. 345.

21. Land is purchased with funds in which S has a life estate, with remainder to her children; and the land is to be subject to the same trusts. But without the knowledge of S, it is conveyed to her husband, who conveys it in trust to secure a debt; the creditor having knowledge of the facts. The creditor has no right in equity to charge the land with the payment of his debt. *Smith et als. v. Flint et als.*, 6 Grat. 40.

22. A testatrix bequeaths property to her married daughter for her separate use; so much thereof as may be in existence at her death, to go to her children or their descendants, if any there be. And to effect the purpose of the bequest, she appoints a trustee, to whom the property is to be delivered by the executor. And she directs that all receipts given by the daughter to the trustee for payments made to her of principal or interest of the property, shall be to him a full discharge. The daughter is entitled to use both the principal and interest of the property at her discretion. *Brown v. George*, 6 Grat. 424.

23. A trust deed held to be fraudulent on its face, though executed to indemnify a *bona fide* surety. *Spence v. Bagwell et als.*, 6 Grat. 444.

24. A trust deed secures creditors in classes. If the trustee refuses to act, one or more of the creditors may sue for all to enforce the trust. *Reynolds v. The Bank of Va. et als.*, 6 Grat. 174.

25. In such case it is error simply to appoint trustees in the place of those who refused to act; but the court should have the trust administered under its own supervision and control. *Ibid.*

26. A trust deed to secure creditors reciting the amount of the debts

due to the different creditors, is not conclusive even against the grantor and his administrator of the amount of the respective debts. *Griffin's ex'ors v. A. Macaulay's adm'r*, 7 Grat. 476. *Dismal Swamp Land Co. v. The Same. Ibid.*

27. A creditor of a grantor in a deed of trust to secure creditors, may show by proofs that his debt was intended to be secured under the provisions for another creditor. *Ibid.*

28. Under the words in the deed of "all debts due to the grantor," the indebtedness of a partner of the grantor to the partnership, and also a claim which the grantor has on a foreign government for damages for the detention of a ship, will pass. *Ibid.*

29. A deed executed *bona fide* to secure a loan of money, not to be enforced for ten years, is a valid deed as against creditors of the grantor. *Lewis et als. v. Caperton's ex'or et als.*, 8 Grat. 148.

30. Property covered by various deeds of trust, which may be enforced at different periods, having been sequestrated at the suit of a judgment creditor of the grantor, when the court disposes of the trust subjects, and the rents and profits thereof, the judgment creditor will only be entitled to the rents and profits of the different trust subjects up to the earliest period when either of the valid incumbrances covering the subject was authorized to be enforced, and the different incumbrancers will each be entitled to the rents and profits of the subject covered by his deed from the time he was authorized by the terms of the deed to enforce it. *Ibid.*

31. The wife of the grantor not having joined in the first deed conveying land to secure a debt, but uniting in a second deed conveying the same land to another creditor, the second incumbrancer is entitled to the value of the wife's contingent right of dower in the land, to be paid out of the proceeds in preference to the first incumbrancer. *Ibid.*

32. There being no seals or scrolls affixed to the names of the justices taking the privy examination of a *feme covert*, under the act of 1792, though in the body of the certificate it purports to be under their seals, whether the certificate is valid is at least so doubtful, as to cast a doubt upon the title; and the husband being dead, and the interest of the wife having been the fee, and her title not being barred by lapse of time, a sale of the land under a trust deed should not be made until the cloud upon the title is removed, though neither the *feme* during her life nor her heirs since, have set up any claim to the land. *Bryan v. Stump*, 8 Grat. 241.

33. Property conveyed by husband in trust for himself and wife by deed not duly recorded, is sold under a decree at their suit against the trustee, and conveyed by deed which is duly recorded. Neither the land nor its proceeds are liable to a subsequent creditor of the husband. *Glazebrook, adm'r v. Ragland's adm'r*, 8 Grat. 332.

34. A deed of trust is given to secure several bonds, some of which are afterwards assigned by the obligee. The assignee is entitled to the benefit of the deed of trust. *Schofield v. Cox et als.*, 8 Grat. 533.

35. A deed of trust is made to secure certain creditors for some of whose debts sureties are bound; and the deed directs the trustees so to dispose of the trust property that no surety in the said debts suffer, or be injured on account thereof. The debts for which sureties are bound, are preferred debts, and to be first paid. *Miller v. Holcombe's ex'or et als.*, 9 Grat. 665.

36. A mortgagee in possession and the mortgagor enjoin a sale of the land advertised to be made under a prior deed of trust upon the ground that the debt is usurious. The court holds that, the debt is partly usurious, but partly *bona fide*, and that the deed is valid security for the part that is *bona fide*; and directs a sale of the property for the payment of what is *bona fide* due. The proceeds of the sale not being enough to pay this amount, and what was due in a prior deed, the mortgagee is not to account to the prior creditor for the rents and profits of the property; there having been no application for a receiver, or that he should be held to account as such. *Bank of Washington v. Hupp*, 10 Grat. 23.

37. Though by the terms of the mortgage the mortgagee had a discretion to apply the profits to pay his own debt, or those for which he was surety, or to the debt of the party secured by the prior deed of trust, he was not bound to apply any part of the profits to this prior debt; and this especially as the holders of that debt claimed not under the mortgage but against it. *Ibid.*

38. A testatrix devises and bequeaths a small farm, slaves and other property upon the land to a trustee for the life of her daughter, H, remainder to the children of H living at her death. And the trustee is directed so to use and conduct the farm, &c., as to be most advantageous to the interests and support of H, and her children during her life. There are five children, and the husband of H is dead. H becomes indebted, judgments are recovered against her, and she is discharged as an insolvent debtor; and then her creditors file a bill to subject her interest in the property to the payment of their debts. HELD: H and her children are not entitled to have set apart for each of them an equal share of the trust property or of its annual products: but it is to be held by the trustee, and the annual products are to be applied to their support according to the necessities of each. *Nickell & Miller v. Hundley et als.*, 10 Grat. 336.

39. The creditors could only be entitled to the ratable portion of H, of any surplus of the annual products of the trust subject after providing for the support of H and her family, and as any such surplus is not alleged or shown to exist, the bill was properly dismissed. *Ibid.*

40. If any surplus product exists now, or shall hereafter exist, the plain-



tiffs may file a bill to subject it, notwithstanding the dismissal of this bill. *Ibid.*

41. A deed of trust and power of attorney made at the same time by and to the same party, and having reference mainly to the same property, and to some of the same debts, considered as one instrument, and construed so as to stand together. *French v. Townes et als.*, 10 Grat. 513.

42. Though upon the face of the instruments the trustee in the deed, and the attorney in the power would have been a preferred creditor, yet he, in his answer to a bill filed by the *cestui que trust*, admitting that as to one class of his securities he was upon the same footing with the plaintiff, the instrument will be so construed. *Ibid.*

43. All the parties claiming under the instrument, there can be no question between them as to whether it was properly admitted to record. *Ibid.*

44. Trustees having sold property to one of the *cestuis que trust*, where both were acting under a mistake of facts, and under this mistake the *cestui que trust* giving more for the property than he would have given, because it was to be credited on his debt; and it proving to be more than his share of the fund, the sale will be set aside, and both will be charged with the true value of the property; and the whole debt of the *cestui que trust* will be estimated in the apportionment of the fund. *Ibid.*

45. In the absence of any proof to the contrary, a commissioner who is directed to take an account of the trust fund and the trust debts, in stating the account of the debts, should take the amount of the debts as stated in the deed. *Ibid.*

46. Before a judgment is recovered one half of the defendant's land had been purchased and payments made upon it; and after the judgment the purchaser gave up the land to his vendor, and took a deed of trust upon it for the amount of his payments. The taking the deed of trust merged any prior equity he might have had, and the judgment is to be preferred to the deed. *Buchanan v. Clark et als.*, 10 Grat. 164.

47. A prior deed of trust unrecorded is null and void as to a subsequent judgment; and the judgment is a lien upon the property embraced in the deed. *McCance v. Taylor*, 10 Grat. 560.

48. A settlement which gives to the grantor a bare maintenance with his wife for life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property, as can be subjected to satisfy such after contracted debts. *Johnston v. Zane's trustees et als.*, 11 Grat. 552.

49. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers, and puts the allegations of the bill to issue: but the bill is

taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*; and the plaintiff must prove the case as to both. *Ibid*.

50. A conveyance of land and slaves upon a trust to permit the slaves to live upon the land, and take the profits of the land and of their own labour to their own use, they to continue to be slaves, is null and void, and passes nothing to the grantees or the slaves. *Smith's adm'r v. Betty et als.*, 11 Grat. 752. *Same v. Thurman et als.* *Ibid*.

51. Money lent by a bachelor uncle to his nephew, to secure which, a deed of trust was executed, was held under the circumstances to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle. *Fitzhugh's ex'ors v. Fitzhugh*, 11 Grat. 210.

52. A deed of trust which, among other things, conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not fraudulent *per se* as to creditors. *Cochran v. Paris et als.*, 11 Grat. 348. *Dance et als. v. Seaman et als.* *Id*.

53. Though the deed be executed without the knowledge of the creditors secured by it, yet if when informed of its execution they assent to it, it is valid. *Ibid*.

SEE DEEDS.

---

## TRUSTEES.

1. A trustee acting in good faith, is only liable for his own receipts. *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 113.

2. Trustees join in a sale of real estate which it is proper they should make, and the proceeds of sale are received by one, the others are not responsible for them. *Ibid*.

3. In such a case the proof of fraud must be distinct and conclusive to charge the other trustees. *Ibid*.

4. A court of equity will not entertain a suit by a trustee or *cestui que trust* against purchasers of the trust property claiming adversely, there being no obstacle in the way of proceeding at law. *Sheppards v. Turpin*, 3 Grat. 373.

5. Property conveyed in a deed of trust is taken under execution and sold; after five years the purchaser is protected by the statute against the action of the trustee or *cestui que trust*, to recover it. *Ibid*.

6. A mere constructive trustee may protect himself by the statute of limitations. *Ibid.*

7. A trustee accountable for rents and profits received by him is chargeable with interest thereon. *Mundy v. Vawter et als.*, 3 Grat. 518.

8. A purchase by a trustee in violation of his trust, and a conveyance to him by the grantor in the trust deed and the other trustee, are wholly null and void. *Ibid.*

9. Such a trustee cannot recover on the warranty in his deed, but the contract having been made under a mutual mistake as to the title, he may recover from each grantor what he received of the purchase money. *Ibid.*

10. Land is conveyed in trust, first, to pay the debts of the grantor out of the rents and profits; second, for the support of the grantor, his wife and children; and third, at his death to be divided among the children. The trustees have no authority to sell the land for the payment of the debts of the grantor, or for any other purpose, however urgent the necessity for such sales. *Ibid.*

11. A trustee defendant resisting plaintiff's claims, and failing in his defence, is liable for costs. *Beverley v. Brook et als.*, 4 Grat. 187. *Same v. Scott et als.* *Id.*

12. A trustee has no power to change the trust fund, except as authorized by the instrument creating the trust. *Heth et als. v. Richmond, Fredericksburg & Potomac Railroad Co.*, 4 Grat. 482.

13. In an action by a trustee on an indemnifying bond, *quære*: If plaintiff is not entitled to recover, though some of the debts secured by the deed are fraudulent, if other debts secured by it are *bona fide*? *Billups v. Sears et als.*, 5 Grat. 31.

14. In an action by a trustee on an indemnifying bond, the defence is, fraud in the deed; but there is a verdict and judgment for the plaintiff. The defendant afterwards comes in equity, on the ground of after-discovered evidence establishing the fraud as to some of the debts secured, but not questioning the *bona fides* of others, and asks for an injunction to the judgment, for a new trial, and for general relief. The ground of equity jurisdiction being established, the court will not direct a new trial, because it would not probably afford the proper relief; but will retain the cause, and allow the plaintiff to impeach the deed, notwithstanding his unsuccessful effort at law. *Ibid.*

15. The cause being properly in the court of chancery, the plaintiff is entitled to have an account of the trust subject, and have it properly disposed of among all the parties interested in it, according to their respective rights. *Ibid.*

16. There having been no misconduct in the trustee of a married woman, it is error to make a personal decree against him for the debt of his *cestui que trust*. *Woodson, trustee, v. Perkins*, 5 Grat. 345.

17. In a suit brought by the trustee of a *feme covert* to assert and defend her rights, in which a full opportunity is afforded the *cestui que trust* to protect her rights, it is not necessary that she should be made a party. *Ibid.*

18. A trustee appealing from a decree construing the trust, and the decree being affirmed, he shall pay costs. *Brown v. George*, 6 Grat. 424.

19. A trustee to sell, selling such property and such title only as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser. *Sutton v. Sutton*, 7 Grat. 234.

20. The object of the trust being to sell for what the property will bring, and there being no warranty by the grantor in the deed of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of the land. *Ibid.*

21. A person named a trustee in a deed to secure debts, unites in sales necessary in the execution of the trust, and other formal acts, but he receives none of the trust funds, they being received by his co-trustee. And he is guilty of no fraud in relation thereto. He is not responsible for the misapplication or waste of the funds by his co-trustee. *Griffin's ex'ors v. A. Macaulay's adm'r*, 7 Grat. 476. *Dismal Swamp Land Co. v. Same. Id.*

22. A trustee is not responsible for estimated rents, when he had received none, where his delay in selling the property arose out of the difficulty of finding a purchaser. *Ibid.*

23. The trusts of a deed having been satisfied, it may be released by the trustee to a subsequent purchaser from the grantor. *Bryan v. Stump, &c.*, 8 Grat. 241.

24. Property is conveyed to trustees to be sold for the payment of creditors of the grantor. Under the circumstances of the case, both trustees are responsible for the application of the whole of the trust fund. *Miller v. Holcombe's ex'or et als.*, 9 Grat. 665.

25. Trustees having sold slaves, a part of the trust subject, to three partners, all of whom were men of wealth, without taking any security for the price, and having permitted them to retain it for years, until they all became insolvent, are personally responsible for the amount of the trust fund so lost. *Ibid.*

26. A trustee making a compromise with a third person in relation to the trust subject, though he may purchase the subject for himself, is bound to account for all the profits made on the transaction. *Ibid.*

27. *Quære*: If in an action by a trustee in a deed of trust to recover property against a purchaser from the grantor, proof of payment of the debt is admissible to defeat the action under the general issue? *Nichols v. Campbell*, 10 Grat. 560.

28. If defendant may prove payment of the debt before the institution of the suit, and after the day of payment prescribed in the deed, he cannot, under the general issue, prove payment after the commencement of the action. If such payment could be a good defence, it could only be under a plea to the further maintenance of the action, or *puis darrein continuance*, according as the payment was made before or after plea pleaded. *Ibid.*

29. One of three administrators of a creditor in a trust deed being present when the sale was made to the defendant, and not making any claim to the slaves or objecting to the sales, even if his conduct was fraudulent, would afford no defence to the action at law; the title to the property not being in the administrator, but in the trustees in the deed; and the act of the administrator could not divest the title of the trustees. *Ibid.*

30. An injunction to inhibit the sale of the property by the trustees is not a bar to their bringing an action for the recovery of the trust property. and even if they are guilty of a contempt, that is to be redressed by the court of chancery acting upon the parties, and will not prevent the maintenance of the action. *Ibid.*

31. In such a case, the pendency of the injunction will not mitigate the damages which the plaintiffs are entitled to recover. If entitled to recover the property, they are entitled to recover the hires and profits from the time it or they were held adversely. *Ibid.*

32. The trustees having brought an action of detinue to recover the trust property, and one of them dying, the right of action survived to the other; and he may carry on the suit. *Ibid.*

33. In such case, pending the suit, the beneficiary dies, and the surviving trustee becomes his administrator. A decree is made in a chancery cause, in which the grantor in the deed, the administrator and the others are parties, directing the sheriff to execute the trust. This decree does not divest the trustee of the legal title, nor destroy the right of action; but the sheriff has a right to control and manage the cause in its further prosecution; and to use the name of the trustee in any other suit which may be necessary to recover possession of any part of the trust property. *Ibid.*

34. A court of equity will not in general assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion. Nor will a suit be entertained to compel a trustee to exercise his power. *Cochran v. Paris et als.*, 11 Grat. 348.

35. A testator gives his estate to his executors for the benefit of his son ; if and when they shall judge that it should be prudent to entrust him with it, to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate, equity will compel them to turn over the estate to him. And before it is done, the son has such an interest in the estate that it is subject to his debts. *Ibid.*

36. Real estate is conveyed to secure debts. The grantor in the deed has at the time but an equitable title, but is entitled to call for the legal title. It is an abuse of his power by the trustee to sell the property before getting in the legal title. *Rossett v. Fisher et als.*, 11 Grat. 492.

37. The trustee having sold the property for one-fourth of its value, without getting in the legal title, and the principal creditor having become the purchaser, under the circumstances, equity will set aside the sale. *Ibid.*

---

### TURNPIKES.

1. The president and directors of the North-west Turnpike road are a corporation liable to be sued for work and labour performed, and materials furnished for them, though constructed on account of and owned by the Commonwealth. *Dunnington v. President and Directors N. W. Turnpike Road*, 5 Grat. 160.

2. For the construction of the statutes in relation to the turnpike over Price's mountain, see *Price's heirs v. Price's adm'r*, 9 Grat. 45.

---

### UNLAWFUL ENTRY AND DETAINER.

1. The defendant in a proceeding of unlawful detainer dies pending an appeal by the plaintiff below. The cause cannot be revived. *Chapman v. Dunlap*, 4 Grat. 86.

2. On a warrant of unlawful entry and detainer against two, the warrant is executed on one, but not on the other. The plaintiff may proceed against the one upon whom the warrant has been executed. *Harman v. Odell*, 6 Grat. 207.

3. No further proceedings can be had upon that warrant against the one upon whom it has not been executed, before the return day thereof. *Ibid.*

4. In a proceeding of forcible entry and detainer, the court failing to meet on the day to which it is adjourned, the cause is not discontinued, but

stands adjourned, by operation of law, to the next term of the county court. *Mann v. Gwinn et als.*, 8 Grat. 58.

5. Upon a writ of unlawful detainer, the defendant sets up title in himself. The plaintiff may prove that the defendant entered on the premises under a parol lease from himself, though the lease proved was to continue more than a year. *Adams v. Martin*, 8 Grat. 107.

6. In a writ of unlawful detainer, the defendant claiming title under a deed to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession. *Ibid.*

7. The caption of a deposition, describing it as taken in a proceeding of unlawful entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. *Oales v. Miller et als.*, 8 Grat. 6.

8. If a case of unlawful detainer has been pending in the county court for more than twelve months, without a final decision, it may be removed on motion to the circuit court. *Harrison v. Middleton*, 11 Grat. 527. *Kincheloe v. Tracewells*, 11 Grat. 587.

9. The year is to be estimated from the organization of the court summoned to try the unlawful detainer. *Kincheloe v. Tracewells*, 11 Grat. 587.

10. An unlawful detainer case removed to the circuit court, is properly placed on the docket at the head of the civil causes in the court. *Harrison v. Middleton*, 11 Grat. 587.

11. A landlord sells land in possession of his tenant by agreement under seal, and the tenant refuses to deliver possession; the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. *Ibid.*

12. To entitle the plaintiff to recover possession upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding possession by the defendant, that may be aided by the complaint which states the fact. *Kincheloe v. Tracewells*, 11 Grat. 587.

---

## USAGE.

1. A creditor requests his debtor to remit the amount due; this does not authorize evidence of a local usage or understanding to give a meaning to the terms of the letter different from that which they obviously bear. *Gross, Myers & Moore v. Criss*, 3 Grat. 262.

2. Whether a remittance of money by mail is the usual mode when a

creditor directs his debtor to remit money to him in general terms, without prescribing the mode, is a question of fact to be ascertained by a jury, and not to be decided by the court. *Ibid.*

---

## USURY.

1. The plaintiff, in a judgment at law, against the administrators of the obligor in the bond in which it was founded, goes into equity to enforce it, and there the administrators insist that there was an usurious premium for forbearance, included in the bond. **HELD:** The relief will only extend to the usurious premium, and the judgment is valid for the balance thereof. *Rankin's ex'or v. Rankin's adm'rs*, 1 Grat. 153.

2. A person having borrowed money on usurious interest, procures the bond of a third person, which he transfers to his creditor, in part discharge of the usurious debt and executes his own bond to such third person for the same amount, giving a deed of trust to secure the latter. Afterwards the usurious creditor requiring the payment of the bond transferred to him, the obligor in that bond, directs a sale of the trust property. Equity will enjoin the sale of the trust property, and if the usurious creditor attempts to enforce the payment of the bond transferred to him, will enjoin him from such proceeding. *Cabaness v. Matthewset als.*, 2 Grat. 325.

3. A private person discounts commercial paper and deducts the interest at the time of the discount. This is not usury. *Parker v. Cousins*, 2 Grat. 372.

4. On the discount of a note for the maker, it is agreed that it may be renewed every sixty days for a specified time, on the makers paying the discount. It is so renewed and upon the renewals, interest is charged twice for every sixty-fourth day. This is not usury. *Ibid.*

5. On the discount of commercial paper, the month is reckoned at thirty, and the year at three hundred and sixty days, and interest of one-half per cent. for thirty days, is taken in advance. This is not usury. *Ibid.*

6. A usurious security is given for a pre-existing *bona fide* debt. Though the usurious security is void, the pre-existing debt is still valid and may be recovered. *Ibid.*

7. A bond and deed of trust executed for a loan of money, the amount of which is made up, in part, of a preceding valid debt, and in part of stocks passed at a price considerably above their market value, is usurious. *Bank of Washington v. Arthur et als.*, 3 Grat. 173.

8. Though the bond and deed of trust is usurious and void, yet as a part of the consideration thereof is a pre-existing valid debt, a court of equity will not compel the obligee to establish his claim at law before pro-



ceeding to enforce his security ; and the obligee will only be relieved in equity upon equitable principles. *Ibid.*

9. Upon a bill framed for compelling the obligee to establish his debt at law, the court refusing that relief will relieve on principles of equity. *Ibid.*

10. The obligor in the bond is not bound by a promise to pay to the assignee after assignment, without consideration ; but may set up the usury against the assignee for value. *Ibid.*

11. The failure of the obligor to inform the assignee of the nature of the consideration, and his promise to pay not proceeding from fraudulent intent, and having produced no injury to the assignee, the obligor is not precluded from setting up the usury against the assignee. *Ibid.*

12. Interest paid on a bond in advance for three years, and this stated in the bond, but paid in land at a price fixed in reference to the annual interest for three years, is not usurious ; and the plaintiff may prove the facts on the trial. *Porterfield v. Coiner*, 4 Grat. 55.

13. To repel the intent to take usurious interest, plaintiff may show the value of the land at the time of the contract. *Ibid.*

14. L and C, at the request of S, execute their bonds each to the other, and sell them to *bona fide* purchasers, and pay over the proceeds to S, who executes his bond to them for the amount of their bonds. The purchase of the bonds of L and C at a discount is not usury, and the bond of S to L and C is not usurious. *Law's ex'ors v. Sutherland et als.*, 5 Grat. 357.

15. The party who pleads usury must prove it. *Harnsberger's adm'r v. Kinney*, 6 Grat. 287.

16. What is not a *prima facie* case of usury, which will put the *onus* upon the plaintiff to prove a further consideration of the bond sued on. *Ibid.*

17. A surety in a bond who had given a deed of trust to secure the debt, executes another deed of trust to secure another debt of his principal due to the same parties, in consideration of the forbearance of the creditors to sell under the first deed. The second deed is usurious and void. *Hopkins, &c. v. Koonce*, 6 Grat. 387.

18. An assignment of a bond at a large discount, with a deed of trust by the assignor to secure the whole amount of the bond, if the obligor should fail to pay it by a certain time, is usurious. *Bell et als v. Calhoun*, 8 Grat. 22.

19. A party coming into equity to injoin a sale under a usurious deed of trust, though he does not ask a discovery, is only entitled to relief to the extent of the usurious premium. *Ibid.*

20. A deed of trust upon land is executed to secure a usurious debt. Afterwards, a new bond is executed, from which all the usurious premium is excluded, and it is agreed between the parties that the deed of trust shall stand as a security for the new bond. Subsequent to this agreement, a third party recovers a judgment against the grantor upon a bond executed before the deed was made, and files a bill to set aside the deed as usurious. The parties having by their agreement done all that a court of equity would have done, and having agreed that the deed of trust should stand as a security for the second bond, that agreement is valid, and the deed is a valid security for the bond. *Martin v. Hall et als.*, 9 Grat. 8.

21. In a controversy between the obligor and assignee of a bond, the obligee is not a competent witness to prove the usury. *Wise v. Lamb*, 9 Grat. 294.

22. The answer explicitly denying the allegations of the bill as to the usury, and there being no competent evidence to prove it, an injunction obtained to the judgment at law should be dissolved, and if the cause is ready for a hearing, the bill should be dismissed. *Ibid.*

23. An issue should not be directed in such a case, and if directed, and there is a verdict finding the usury, the injunction is still to be dissolved, and the bill dismissed. *Ibid.*

24. The statute, Sess. Acts of 1844, ch. 70, p. 54, in relation to pleading usury, though in terms applicable only to pleas, yet is properly applicable to a replication to a plea of set off. *Hope v. Smith, sheriff*, 10 Grat. 221.

25. Sheriff sues upon a bond surrendered by an insolvent debtor, and defendant pleads as offsets two judgments recovered against the insolvent after he took the oath, in actions commenced before. The sheriff cannot set up usury in the bonds upon which the judgments were obtained. *Ibid.*

---

### VARIANCE.\*

1. Declaration in debt on indemnifying bond, alleges defendants bound themselves to pay to any person claiming title to the property all damages, &c. The bond offered in evidence, is in a penalty and with a condition. Held: no variance and admissible evidence. *Kevan v. Branch*, 1 Grat. 274.

2. In *assumpsit*, the writ lays the damages at \$500, the count lays them at \$600; and there being a judgment by default for want of appearance, the jury assesses the damages at \$455. The variance between the writ and the count is immaterial. *Dabneys v. Knapp, Preston & Co.*, 2 Grat. 354.

\* See Code, ch. 171, § 18, p. 648: Code, ch. 177, § 7, p. 672. Code, ch. 207, § 9, p. 770.

3. The writ states the christian name of the plaintiff, by the initial letter and the count gives the name in full. This is no variance. *Ibid.*

4. In a suit by partners, the writ gives the initial letter of the middle name of one of the plaintiffs as P. The count gives it as B, but in both the writ and the count, the partnership name is given. The variance is immaterial. *Ibid.*

5. Where there is a variance between the presentment and the information, it may be availed of as cause against filing the information, or by motion to quash it. *Jones' case*, 2 Grat. 355.

6. In a case of misdemeanor, after the plea of "not guilty," and a trial and verdict on that plea, it is not competent to arrest the judgment for any supposed variance between the information and presentment. *Ibid.*

7. To take advantage by a demurrer of a variance between the declaration and the bond declared on, the defendant must crave oyer of the bond. *Sterrett v. Teaford*, 4 Grat. 84.

8. In an action on an indemnifying bond, the declaration alleges that the obligors bound themselves to indemnify, &c. In the bond they bind themselves, their heirs, executors and administrators jointly and severally. This is no variance. *Dickinson v. Smith & Carter*, 5 Grat. 135.

9. In an action on an appeal bond, the declaration states under a *scilicet*, the costs at a certain sum, and makes profert of the record of the court of appeals. The defendant craves oyer of the record and demurs generally. The record is properly set out in all respects, but the costs endorsed by the clerk of the court of appeals are less than the sum stated in the declaration; that sum including the costs for entering the judgment of the court of appeals in the circuit court and issuing the execution upon it. Held: 1st. That the profert of the record did not extend to the endorsement of the costs by the clerk; and the variance as to the costs was no ground of demurrer. 2d. That there was no variance, as the costs in the circuit court were properly embraced in the demand in the declaration. *Friend v. Woods*, 9 Grat. 37.

10. Judgment is recovered by the justices for the benefit of the Marshal of the Williamsburg Chancery Court. The defendant being dead, the *scire facias* to revive the judgment recites it correctly and adds "which marshal was W." This is no variance. *Richardson's adm'r v. Prince George Justices*, 11 Grat. 190. *Poindexter's adm'r v. Same*, *id.*

---

## VENDOR AND PURCHASER.

1. It is incident to a sale of land by the acre that the purchaser shall be allowed for a deficiency in the quantity of land in the tract purchased. *Neal v. Logan*, 1 Grat. 14.

2. What conditions in the terms of sale, will not deprive a purchaser of the right to an allowance for deficiency. *Ibid.*

3. Vendee put into possession of land bound to pay interest on the purchase money. *Oliver's ex'or v. Hallam's adm'r*, 1 Grat. 298.

4. A vendor of real estate, retaining the title, the statute of limitations can not be set up as a bar to his recovery of the purchase money. *Hopkin's adm'r v. Cockerell et als.*, 2 Grat. 88.

5. In such case the staleness of the demand is no defence. *Ibid.*

6. A purchaser of an equity of redemption, having paid off the incumbrance may have the land sold to perfect the title. *Tiffany v. Kent et als.*, 2 Grat. 231.

7. When a vendor of an interest in land has no lien for the purchase money.\* *Sharp v. Kerns et als.*, 2 Grat. 348.

8. A deed of trust for the payment of debts, without notice preferred to the vendor's lien for the purchase money. *Richeson v. Richeson et als.*, 2 Grat. 497.

9. A third person having obtained a decree against a vendee of land for a sum of money to be paid out of the purchase money due the vendor and the vendee having compromised that claim for less than the amount thereof, he is only entitled to a credit upon the purchase money for the sum actually paid. *Byron v. Salyards et als.*, 3 Grat. 188.

10. There having been a mutual mistake as to the extent of the vendor's title to the land sold, a court of equity, under the circumstances, will set aside the sale entirely. *Irick and wife v. Fulton's ex'ors*, 3 Grat. 193.

11. When no demand has been made by the vendor, previous to filing his bill to set aside the sale, and the court sets it aside on the ground of mutual mistake, the court will only decree rents and profits from the filing of the bill and will decree interest on the purchase money from the same time. *Ibid.*

12. A sale of land being set aside, on the ground of mutual mistake, the vendee will be entitled to compensation for permanent improvements made upon the land; but not to exceed the rents and profits. *Ibid.*

13. The vendor of land retaining the title as a security for the purchase money, his lien upon the land cannot be affected by any lapse of time, short of a period sufficient to raise a presumption of payment, whatever may be the operation of the statute of limitations in an action at law for the purchase money. *Hanna v. Wilson*, 3 Grat. 243.

14. A vendor of land takes a bond for the purchase money and retains

\* Vendor's equitable lien abolished. Code of Virginia, ch. 119, § 1, p. 510.

the title. He does not lose the lien by taking an order for the amount on a third person, payable at a distant day, which is not accepted and surrendering the bond. *Knisely v. Williams et als.*, 3 Grat. 263.

15. The order not being accepted, the vendor is not bound to wait until the time of its payment before proceeding to enforce his vendor's lien. *Ibid.*

16. What is a contract of hazard, and so not a subject of compensation for either excess or deficiency of land. *Seamonds v. McGinniss*, 3 Grat. 319.

17. A contract in gross for land, is made upon the belief of both parties that a particular line is the southern boundary of the vendor's land, though in fact he owns beyond it, the vendee is not entitled to the land south of the line. *Ibid.*

18. The registry of a deed conveying by general description, without designating the land conveyed, is not notice in law to a subsequent purchaser from the grantor, of the existence of said deed. *Munday v. Vawter et als.*, 3 Grat. 518.

19. Actual notice of such a deed, and of its contents, will not affect a subsequent purchaser unless he had notice that the land purchased by him was embraced by the deed. And the notice must be such as to effect his conscience, and is not enough if it merely puts him upon enquiry. *Ibid.*

20. A purchaser who takes a conveyance from trustees, is bound to have notice of the trusts on which the trustees hold. *Ibid.*

21. But he is only bound to have notice of the trusts to the extent that they appear upon the title papers. *Ibid.*

22. F B devised an undivided moiety of certain lands and mills to J B, who sells to P all his interest in the devise made to him by F B in said lands and mills, for which, to the extent of his interest therein as devised to him by F B, P is to pay him \$1,000; and as soon as P pays the purchase money, J B is to make P a good and sufficient conveyance for his interest in said land and mills, as devised as aforesaid. This is not a contract of hazard. *Price v. Browning*, 4 Grat. 68.

23. There being an after-born child, and the widow's dower being unequally assigned in other lands, and suit brought for the child's portion, and to have the widow's dower reassigned, the purchaser may injoin the collection of the purchase money, until the extent of the incumbrances are ascertained. *Ibid.*

24. Though a purchaser of land has obtained the legal title, and had no notice that there was purchase money due to a previous vendor, yet if his vendor had not the legal title, when he purchased, the land is liable for the purchase money due to the previous vendor. *Barn's ex'or et als v. Campbell*, 4 Grat. 125.

25. A court of equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties, for errors in the decree, or the proceedings under it, where the report of the commissioner has been confirmed. *Worsham v. Hardaway's adm'r.*, 5 Grat. 60.

26. Land on which an annuity is charged, having been sold pending a suit to recover the arrears of the annuity, it will be directed to be sold to satisfy the arrears of the annuity, without noticing the *pendente lite* purchaser. *Philips et als v. Williams, &c.*, 5 Grat. 259.

27. A purchaser of land on which there is an incumbrance, who gives a new bond to a remote assignee, and takes in and cancels the old one, will not be entitled to set-off the incumbrance, especially if he had notice of the incumbrance at the time of giving the new bond. *Washington v. Pollard*, 5 Grat. 432. *Same v. Turpin. Id.*

28. A tenement under lease is sold, and the vendor is to receive the rent as a part of the purchase money. This is a sale subject to the lease, and the vendor's lien is not thereby waived. *Kyle's v. Tait's adm'r.*, 6 Grat. 44.

29. Upon a bill to enforce a vendor's lien against a second purchaser, he sets up the defence of purchaser without notice. The conveyances are produced, but there is no proof of payment of the purchase money; though it does not seem to have been questioned in the court below. There is no positive proof of notice, but the facts render it probable there was notice. The lien was enforced. *Ibid.*

30. Upon a bill to enforce the vendor's lien, the decree should give a day to the defendant to redeem the property, by paying the amount charged upon it. *Ibid.*

31. As a general rule, the decree in such case should direct a sale on a reasonable credit. *Ibid.*

32. A deed for land containing a description of the land, and the amount and time of the payment of the purchase money, and signed by the vendor, but never delivered, is a sufficient memorandum in writing of the contract, to satisfy the statute of frauds and perjuries. *Bowles v. Woodson*, 6 Grat. 78.

33. The application for a specific execution of a contract is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with the contract on his part, and the prayer will not be granted if it would be inequitable towards the other party. *Ibid.*

34. Upon a contract for the sale of land, the vendee pays a part of the purchase money, and fails to comply further, though required to do so by the vendor, who, on such failure, disclaims the contract, but refuses to pay back the purchase money paid. Six years after the vendee seeks to enforce

the contract. This is refused, but he is entitled to have the money he has paid, refunded to him. *Ibid.*

35. Two tracts of land are sold together. The purchaser sells them separately, being still indebted for a part of the purchase money, which is known to both of his vendees. The tract last sold must be first applied to the payment of the purchase money due to the original vendor. *Alford v. Helms*, 6 Grat. 90.

36. A purchaser of land for an aggregate sum, without reference to any specific quantity, having gotten all the land for which the parties supposed they were contracting, is not entitled to any abatement from the purchase money, because the conveyance to him, and the patent under which he derives title embraces other land held by a third person under a better title. *Stafford v. White*, 6 Grat. 93.

37. A vendor is entitled to relief on account of the fraudulent concealment of facts by a purchaser. But under the circumstances, the proper mode of relief is by compensation for the injury, and not a rescission of the contract. *Armistead v. Hundley*, 7 Grat. 52.

38. A trustee to sell, selling such property and such title only as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser. *Sutton v. Sutton*, 7. Grat. 234.

39. The object of the trust being to sell for what the property will bring, and there being no warranty by the grantor in the deed, of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of the land. *Ibid.*

40. A mistake in respect to the title to land, is no ground of relief to a purchaser, when he purchases the land without any agreement, express or implied, for a conveyance with warranty of title. *Ibid.*

41. There is a sale of land and a conveyance with general warranty, and the vendee assigns bonds of a third person in payment of the purchase money. The title to a part of the land being clearly defective, the vendee may enjoin the vendor from collecting so much of the bonds as will compensate him for the land, to which the title is defective. *Clark v. Hardgrove, &c.*, 7 Grat. 399.

42. The vendee is entitled to compensation according to the relative value of the land to which a good title cannot be made. *Ibid.*

43. The vendor should be directed to perfect the title by a day specified by the court; and if he fails to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective. *Ibid.*

44. Though a vendee of land has abandoned possession for a technical

defect of the title, yet upon a bill to enjoin the collection of the purchase money, if the vendor can make a good title at the time of the decree, the vendee is bound to take it. *Mays v. Swope*, 8 Grat. 46.

45. Where the charge upon land for the payment of debts is general, the purchaser from the executor is not bound to see to the application of the purchase money. *Meek's adm'r, &c. v. Thompson et als.*, 8 Grat. 134.

46. In such case, if the sale was necessary at the time it was made, and it was fairly made, and the purchase money was paid, the failure of the executors to account for and pay the proceeds to the creditors of the estate, will not impair the title of the vendee. *Ibid.*

47. A vendor of land retains the title in accordance with the contract. He has a lien on the land for the purchase money, as against creditors and incumbrancers of the purchaser; and this, though the purchaser has subsequently executed a deed on other property to secure the purchase money. *Lewis et als. v. Caperton's ex'or et als.*, 8 Grat. 148.

48. A sells and conveys land to M, and takes bonds for the purchase money, retaining the vendor's lien, one of which bonds he assigns to R, M sells a part of the land to C, and before he conveys, it is agreed between M, C, and R, that C shall execute his bond to R in lieu of the bond of M assigned to K by A, and that R shall retain his lien on the land. Before M conveys to C, C by contract in writing, sells the land to M W, who pays a part of the purchase money to C, without notice of R's lien. There is a conveyance by M to C, but no conveyance by C to M W. R files his bill to subject the land to the satisfaction of his debt. **HELD:**

1st. That R had a lien upon the land in the possession of C, as such was the intention of the parties.

2d. But M W having been permitted to take possession of the property, to hold it for a time, and make payments for it without notice, his equity shall be preferred to that of R, and the land shall only be liable to the extent of the purchase money unpaid at the time M W received notice of R's lien.

3d. **QUÆRE:** If R would have had a lien upon the land in the hands of C, in the absence of evidence that such was the intention of the parties? *Cox, &c. v. Romine*, 9 Grat. 27.

49. L buys land of D and T and executes to each, bonds for his share of the purchase money. The contract is afterwards rescinded, but before this is done D assigns one of the bonds executed to him. L is entitled to recover from D the amount of the bond; but D being liable as assignor of that bond, L is not to collect the amount until he shall have paid off the judgment upon the bond, or D is otherwise released from his liability as assignor. *Drake v. Lyons*, 9 Grat. 54.

50. In a contract for the sale of land by the acre, the purchaser will not



be relieved in equity on the ground of a mutual mistake as to the boundaries of the land, unless the mistake is fully and clearly made out. *Lea's ex'or v. Eidson*, 9 Grat. 277.

51. A vendor retaining the title, retains a lien upon the land for the purchase money in the hands of a second purchaser. *Stuart's ex'ors v. Abbott et als.*, 9 Grat. 252.

52. The vendee being insolvent, a contract between one of the executors of the vendor and the second purchaser, which is doubtful in its import, will not be construed into an agreement to release the lien upon the land. *Ibid.*

53. If one of the executors does not contract to release the lien, it being the only security for the debt, it will not be enforced in a court of equity against the executors. *Ibid.*

54. Pending a bill for an injunction to a judgment, and for the rescision of a contract for the purchase of land on the ground of an incumbrance and defect of title, vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff. *Young's adm'r and Bowyer v. McClung's et als.*, 9 Grat. 336.

55. The title having been obtained by a suit in equity, by the assignee of the purchase money in which a conveyance was decreed; after the decree, but before the conveyance is made, a son of the vendee files a bill in another court, in which he falsely and fraudulently alleges that he had paid off the incumbrance on the land and retained the lien; and with the fraudulent connivance of the vendor, who is insolvent, he obtains a decree for the sale of the land to satisfy his pretended lien; and the land is sold and the sale is confirmed. **HELD:**

That the conveyance to the vendee having been made in pursuance of a contract entered into long before the commencement of the suit by the son of the vendor, and, in obedience to a decree made before the commencement of that suit, the deed had relation back to the date of the contract, or at least to the date of the decree directing it; and therefore, the decree and sale in the son's suit, is inoperative against the title of the vendee, and give him no equity for an injunction and rescision of the contract. *Ibid.*

56. The decree in the son's suit may and must, if necessary for the protection of the vendor and his assignee, be held to be wholly inoperative as to them. *Ibid.*

57. The purchaser under the decree in the son's suit having been cognizant of the proceedings in the suits of the vendee to enjoin the purchase money, and of the assignee to procure the title; and being in fact bound as surety for that purchase money, and having purchased and permitted the sale to be confirmed without objection, is not entitled to be relieved from

his purchase, and from paying his purchase money, though he acquires no valid title to the land purchased by him. *Ibid.*

58. Though the purchaser may come into equity to enjoin a judgment for defect of title, and though the title is afterwards procured, he will be entitled to his costs; yet if there was another suit in which he might have had the relief by petition or supplemental bill, he will not be allowed his costs. *Ibid.*

59. A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee of a bond given for the purchase money on the ground of difficulties in the title, though the title is decreed to him in the suit, he is entitled to set up in equity offsets which he held against the vendor prior to the assignment, and he was not bound to plead them at law. *Ragsdale v. Hagy et als.*, 9 Grat. 409.

60. Pending a bill of injunction to a judgment, and for the rescision of a contract for the purchase of land on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved but without damages, and with costs to the plaintiff. *Reeves v. Dickey*, 10 Grat. 138.

61. A party having made a purchase of three-sixteenths of a tract of land, upon condition that a certain ore upon it proved to be good silver ore, afterwards sold one-sixteenth of the land absolutely, the purchaser knowing the terms of his purchase. The sale is a valid sale. *Ibid.*

62. The state of the vendor's title being known to the purchaser, and the legal title being in fact outstanding, the vendor is entitled to a reasonable time in which to perfect the title. *Ibid.*

63. B, for himself and others, sells part of a tract of land to J, who executes to B his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their interest in the whole tract to J. B having recovered judgments upon the bonds, J is entitled to have the judgments enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B to procure the others to execute the contract. *Joyes et als v. Brock*, 10 Grat. 211.

64. Land sold is to be laid off in one, two or three tracts as the purchaser may choose. The vendor is not in default for failing to convey until the purchaser has made his selection, and has caused the land to be surveyed. *Purcell v. McCleary et al.*, 10 Grat. 246.

65. There being a latent ambiguity in the contract of sale which can only be removed by a survey, it is error to decree a rescision of the contract until a survey is made, and it is thus ascertained whether the vendor can comply with his contract. *Ibid.*

66. W being the owner of a lot in Danville, made a verbal agreement with S for the sale of it to him. S sold to A, who received a conveyance for

the lot from W, with general warranty, and executed his bonds to S for a balance of the purchase money. At the time of the sale, the lot was made more valuable by a change in a street, which street was afterwards returned to its original location by the town authorities. S having made no representations on the subject to A, having been guilty of no fraud, and having made no warranty of title, is not liable to A for the damage he has sustained, and A cannot enjoin the collection of the purchase money. *Price's ex'ors v. Ayres*, 10 Grat. 575.

67. Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money, in the absence of proof of any agreement to the contrary, they are entitled to the land in equal portions. *Jarrett v. Johnson*, 11 Grat. 327.

68. One of the purchasers having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed, the other should have a specified part of the land; but the contract was not completed. This agreement between the purchasers was then at an end, and cannot affect their rights under their joint purchase. *Ibid.*

69. In such a case of a joint purchase parol evidence is not admissible to prove an agreement between them for an unequal division of the land. *Ibid.*

70. In such a case the purchaser claiming to be entitled under an agreement between them to the largest portion of the land, files a bill for specific performance of the agreement, and for partition accordingly. Though he fails to prove the agreement, the court may go on to make partition, according to the legal rights of the parties. *Ibid.*

71. Where the contract for the sale of land is entire for a specific sum of money, and the title to a part of the land fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescision of the whole contract; but the purchaser cannot insist upon a partial rescision. *Bailey v. James*, 11 Grat. 327.

72. In such a case if the purchaser declines to rescind the contract, he must pay the whole purchase money. *Ibid.*

73. Upon a bond to pay the purchase money of land with a provision that upon the purchaser's failure to get the legal title from a third party, the contract of sale shall be void, the purchaser having been let into possession, and continuing to hold, and himself neglecting to get in the title, he shall pay interest. *Ibid.*

74. The vendor having but an equitable title, and only selling his interest in the property without warranty, and authorizing the purchaser to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him. *Ibid.*

## VERDICT.

1. On a trial of a *scire facias* against bail, the function of the jury is exhausted, when it negatives the defendant's plea. *Bowyer v. Hewitt, Ruffner & Co.*, 2 Grat. 193.

2. When on such trial the farther finding of the jury will be considered as supererogatory and be disregarded. *Ibid.*

3. In *assumpsit* the jury gave interest from a day previous to the date of the account filed with the declaration. This is not error. *Dabneys v. Knapp, Preston & Co.*, 2 Grat. 354.

4. The jury having fixed the term of a prisoner's imprisonment at a period shorter than the law allows, it is error in the court to enter a judgment on the verdict for the shortest period authorized by law for the offence. If such error is discovered before the discharge of the jury, they should be sent back with instructions by the court, and if they persist in finding the same verdict or are discharged before the error is found out, then the court must award a *venire de novo*. *Nemo's case*, 2 Grat. 558.

5. A verdict finds the defendant guilty of the waste as charged in the declaration, and the plaintiff waiving a recovery of the place wasted, the verdict proceeds to assess damages for particular parts of the waste charged, but does not set out the *locus in quo*, or find any part of the issue for the defendant. The verdict is sufficient. *Dejarnette v. Allen and wife*, 5 Grat. 499.

6. In an action of waste the verdict finds for the plaintiff and assesses damages, but subject to the opinion of the court whether, upon certain facts stated, the plaintiff can maintain the action. This is a general verdict. *Ibid.*

7. The indictment charges the burning of the dwelling house of E on the 11th day of February 1850. The verdict is "guilty of arson in the day time" on the 11th of February 1850. This is sufficiently certain. *Curran's case*, 7 Grat. 619.

8. In ejectment the jury sets out the wills of the grandfather and father; and if the son, who is dead, took under the father's will, they find for the plaintiff. If he took under the will of the grandfather, they find for the defendants. The verdict is sufficiently certain; and submits the simple question upon the construction of the wills to the court. *Callis et als v. Kemp et als.*, 11 Grat. 78.

9. Though in ejectment, the plaintiffs, in their declaration, claim the whole tract of land, the jury may find for them for an undivided interest in it. *Id.*

## WARRANTY.

1. There is no warranty of value on the sale or exchange or paying away of genuine bank notes. *Edmunds v. Digges*, 1 Grat. 359.

2. It seems there is a warranty of the genuineness of a note sold or paid away. *Ibid.*

3. On the sale of land under the tax laws, the Commonwealth does not warrant either the title or description of the lands sold, but the rule *caveat emptor* applies to such sales. *Hoge v. Currin*, 3 Grat. 201.

4. On the warranty of soundness of an animal, it is for the jury to say what is embraced therein; and on that question the qualities and uses for which the animal is purchased and sold, may be referred to as explaining what was intended to be included in the warranty. *Thornton v. Thomson et als.*, 4 Grat. 121.

5. On a warranty of soundness of an animal sold, the measure of damages is the difference between the value of the animal sound as warranted, and his value at the time of the sale in the condition it really was; and the price at which it was sold is the proper evidence of value at that time, if sound, to the extent of the warranty. And the rule is the same whether the purchaser offers to return the animal or not. *Ibid.*

6. The heirs of a wife are not barred from claiming the land to which she was entitled by the collateral warranty of the husband who was their father, in his deeds conveying it to the purchaser's from him. *Norman's ex'x v. Cunningham and wife*, 5 Grat. 63.

7. The act, 1 Rev. Code, ch. 99, § 21, p. 368, applies to cases of real assets descending from the warranting ancestor, and not to personal assets, or assets whether real or personal, accruing from him by devise or bequest. *Ibid.*

8. H sells his claim to a tract of land, and warrants the title as received from his vendor, but disclaims warranting that that title is good. Upon the eviction of his vendee by a party claiming under another title, H is not responsible to his vendee. *Wynn v. Harman's devisees*, 5 Grat. 157.

9. Upon a contract for the hire of a slave, even an express warranty of fitness or suitableness, though it might be understood to cover essential physical or mental defects, yet it would not extend to the absence of moral qualities, or of experience in a particular business, unless specified. *Howell, &c., v. Cowles*, 6 Grat 393.

10. A bond given for the hire of a slave, says: "to work at boat business." This is no warranty of his fitness or experience in that business. *Id.*

11. Case is the proper remedy for the breach of an express warranty of

soundness of a slave, or other personal chattel. *Trice v. Cockran*, 8 Grat. 442.

12. In case for the breach of a warranty of soundness of a personal chattel, it is not necessary to allege the defendant's knowledge of the unsoundness; and if it is alleged, it is not necessary to prove it. *Ibid.*

13. There is a devise to I, with a limitation over, upon his dying without issue at his death, to his brother R, if he should survive him or his representatives, and R dies in the life-time of I. I sells and conveys the land to A; and R, though he does not convey the land, is a party to the deed, and I and R covenant as follows: That the said I, for himself and his heirs, and the said R, as contingent devisee under the will of Col. I, (by whom the said land was devised to I), do hereby covenant and agree to and with the said A, that they will warrant and defend the fee simple estate to said land, to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and to relinquish and fully confirm to said A all the right they or their heirs now have or may hereafter have to said land, or any part thereof, to him and his heirs, free from the claim of the said I and R, and their heirs, and of all other persons in the whole world. **HELD:**

1st. That this covenant of R extends to the claim of his children to the land, though they claim not as his heirs, but as devisees under the will of Col. I.

2d. That the covenant of R is a covenant running with the land, and a purchaser claiming under A a part thereof by a regular chain of conveyances, is entitled to the benefit of said covenant for his indemnity against the claim of the heirs of R. *Dickinson v. Hoomes' adm'r et als.*, 8 Grat. 353.

---

## WASTE.

1. The purchaser at a sheriff's sale of an insolvent husband's interest in his wife's estate is a tenant for life, and may be sued in an action of waste by the husband and wife. *Dejarnette v. Allen and wife*, 5 Grat. 499.

2. In an action of waste by husband and wife against the alienee of the husband's interest in his wife's land, the declaration alleges that the reversion in fee is in the wife. This is in effect to allege that the reversion in fee is in the husband and wife, and if it is not good on demurrer, is cured by the verdict. *Ibid.*

3. In an action of waste the verdict finds the defendant guilty of the waste as charged in the declaration, and the plaintiff waiving a recovery of the place wasted, the verdict proceeds to assess damages for particular parts of the waste charged, but does not set out the *locus in quo*, or find any part of the issue for the defendant. This verdict is sufficient. *Ibid.*

4. In an action of waste the verdict finds for the plaintiff and assesses damages, but subject to the opinion of the court whether, upon certain facts stated, the plaintiff can maintain the action. This is a general verdict. *Ibid.*

---

WILLS.

1. Execution and Probat of.
2. Construction of.

3. Nuncupative.

EXECUTION AND PROBAT OF.

1. A paper intended to be executed as a written will, but not so executed, may be a good nuncupative will, if made under the circumstances and proved by the number of witnesses, prescribed by the statute. *Phæbe v. Boggess*, 1 Grat. 129.

2. An olograph will, with the name of the testator in the commencement, but not subscribed, with a blank left for the date and containing an attestation clause, but without witnesses is not well executed. *Waller v. Waller*, 1 Grat. 454.

3. The finality of the testamentary intent must be ascertained from the face of the paper and extrinsic evidence is not admissible to prove or disprove it. *Ibid.*

4. The signing of a will to be a sufficient signing under the statute, must be such as upon the face and from the frame of the instrument, appears to be intended to give it authenticity. *Ibid.*

5. A person having made a will, which was in his possession and which after his death could not be found, it is to be presumed he destroyed it himself. *Appling v. Eades*, 1 Grat. 286.

6. Proof that a subsequent will was stolen from the testator without proof of its contents, is no revocation of a former will. *Hylton v. Hylton*, 1 Grat. 161.

7. An admission on the record by the contestant of a will of its due execution, does not dispense with the proof. *Ibid.*

8. Upon a bill to contest a will admitted to probat, when that question is decided, no further proceedings can be had in that case. *Coalter's ex'or v. Bryan and wife et als.*, 1 Grat. 18.

9. A marriage settlement gives a power to the wife to dispose of the settled estate by gift or devise under hand and seal, attested by two witnesses. A scroll annexed to her name, though not recognized in the body of the will is a sufficient sealing. *Pollock and wife v. Glassell*, 2 Grat. 439.

10. Parol testimony is admissible to show that the scroll was put upon the paper by the direction of the testatrix, as a seal. *Ibid.*

11. It is not necessary that the attestation clause shall state that the paper was duly signed and sealed by the testatrix. *Ibid.*

12. If a witness, when requested to attest a will adopts his signature, already on the paper, it is a valid attestation. *Ibid.*

13. A testamentary paper duly executed, according to a power recognizing another paper not duly executed, will constitute the paper recognized, a valid testamentary paper. *Ibid.*

14. It is not necessary that the paper recognized should be incorporated into the paper recognizing it. *Ibid.*

15. *Quære*: Whether an assignment under the hand and seal of the assignor, but not delivered and intended to operate only on the death of the assignor may be valid as a testamentary paper. *Ibid.*

16. The sentence of a court of probat fairly obtained, and pronounced upon the merits, by which a paper propounded as a will by the nominated executor is rejected, in a proceeding in which some of the next of kin interested to defeat it are parties defendants, is conclusively binding upon a legatee in said paper, though he was an infant at the time, and no party to the proceeding. *Wills v. Spraggins*, 3 Grat. 555.

17. A bequest to a corporation of its own stock is valid. *Rivanna Nav. Co. v. Dawsons*, 3 Grat. 19.

18. A devise or bequest, whether of real or personal estate, to an attesting witness to a will, without whose testimony the will may not be otherwise proved, is void. *Croft et als. v. Croft ex'or*, &c. 4 Grat. 103.

19. Slaves emancipated by a will may propound it for probat. *Ben Mercer et als. v. Kelsoe's adm'r et als.*, 4 Grat. 106.

20. What nervousness of temperament and eccentricity of disposition, manners and habits is consistent with a sound disposing mind and memory. *Ibid.*

21. A paper writing, though in the hand-writing of the deceased, and signed by him, held not to be his will. *Hocker v. Hocker et als.*, 4 Grat. 277.

22. It is not necessary that the subscribing witnesses to a will should see the testator sign, or that he should acknowledge to them the subscription of his name to be his signature, or even that the instrument is his will. It is enough that he should acknowledge, in their presence, that the act is his, with a knowledge of the contents of the instrument, and with the design that it should be a testamentary disposition of his property. *Rosser, &c., v. Franklin*, 6 Grat. 1.



Missing Page

the other attesting witness, or any other person. The paper is not so proved as to be admitted to probat. *Johnson v. Dunn*, 6 Grat. 625.

32. A will which disposes of both real and personal estate is attested by but one witness ; and, on proof by that witness, is admitted to probat generally ; and no proof is brought within seven years to set aside the will. After seven years from the probat it is a valid will of lands, as well as personal estate. *Parker's ex'ors v. Brown's ex'or et als.*, 6 Grat. 554.

33. In a case of probat the deposition of an aged witness, taken *de bene esse*, will be allowed to be read, upon proof, either by witnesses or his own affidavit, of his inability to attend the court. *Nuckols' adm'r v. Jones*, 8 Grat. 267.

34. A witness called to prove the hand-writing of a paper offered for probat may be impeached by proof of what she has said about that paper at another time. But neither her capacity to judge of the hand-writing, nor her credit, is to be impeached by what she may have said about some other paper. *Ibid.*

35. QUÆRE : Whether an attestation of a will out of the room in which the testator is lying, and out of his sight, but in a case in which the testator was able and might have placed himself in a position to see the witnesses when they signed the paper, is a valid attestation ? A court of four judges equally divided upon the question. *Moore v. Moore's ex'or et als.*, 8 Grat. 307.

36. In a case of probat, a witness unable to attend the court is examined as to the hand-writing of a testamentary paper which had been shewn to him by the propounder of the will, but which was not before him when he gave his deposition. The testimony is admissible, its weight depending upon the certainty of the proof that the paper propounded for probat is the paper that was shewn to the witness. *Nuckols' adm'r v. Jones*, 8 Grat. 267.

37. A testator not laboring under a total or temporary deprivation of reason, is of legal capacity to make a valid disposition of his property, if he is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. *Greer v. Greers*, 9 Grat. 330.

38. Although the testator may labor under no legal incapacity to do a valid act, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. *Ibid.*

39. HELD : That under the circumstances, the recognition of their attestation by witnesses to a will, to the testator, was a substantial subscribing of their names as witnesses in his presence. *Sturdivant et als. v. Birchett*, 10 Grat. 67.

40. From what circumstances it may be inferred that the name of a testator was written in his presence, and before the acknowledgment of the paper as his will. *Nock v. Nock's ex'ors*, 10 Grat. 106.

41. The witnesses to a will subscribe their names in another room from the testator, who, though lying on a bed, is able to walk about; but the witnesses are directly within the range of his vision, so that he can see all their persons except the forearm and writing hand, these being hid from him by the body of the witness whilst he is subscribing his name. *HELD*: The witnesses subscribed their names in the presence of the testator, within the meaning of the statute. *Ibid*.

42. The saving in the act of 1819, 1 Rev. Code, ch. 114, § 13, p. 378, in relation to wills, in favor of persons out of the State, is not repealed by the act of March 8th, 1826, Sup. Rev. Code, p. 260, in relation to the limitation of actions. *Schultz v. Schultz et als.*, 10 Grat. 353.

43. A devisee of a will may propound it for probat; and he then represents the will and all persons interested in it, though such persons may not be *sui juris*; and they are bound by the judgment of the court in the case. And the same is the case if the executor propounds the will. *Ibid*.

44. When a paper is propounded for probat in the proper court, by a devisee therein, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from probat, such sentence is conclusively binding upon all claiming under the paper. *Ibid*.

45. What is a sentence on the merits of the application? *Ibid*.

46. The jurisdiction of a court of probat is not exhausted by the admission to probat of the testamentary papers passed upon at one time. If a codicil to the will admitted to probat be afterwards found, or a will supplemental to the first, or one which may consist with the first and has no clause of revocation, or a will without a clause of revocation, which, though it conflicts in part, may consist in part; in all these cases, the two papers constitute the testator's will, and the second may be admitted to probat upon a second motion after the first has been admitted. *Ibid*.

47. So, if the second paper has a clause of revocation, or conflicts wholly with the first; or from the scheme of the second will, it is apparent that it is intended as a complete disposition of the testator's property, the court of probat has jurisdiction to admit such second paper, though the probat of the first paper is not annulled, but remains in full force. *Ibid*.

48. The county court having rejected a paper offered for probat on the merits; and the circuit court having affirmed the sentence, that sentence is still a judgment on the merits against the paper; though the circuit court may have proceeded on the ground that the county court had no jurisdiction of the case. *Ibid*.

49. If the circuit court intended to decide on the ground of a want of jurisdiction in the county court, it should have reversed the sentence of that court, and entered a judgment over-ruling the motion to admit the paper on the ground of the want of jurisdiction. *Ibid.*

50. What does not constitute incapacity in a testator. *Parramore v. Taylor*, 11 Grat, 220.

51. What is not an improper influence which will invalidate a will, *Ibid.*

52. The Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other. *Ibid.*

53. T subscribes his name to his will in the presence of C, and requests C to attest it, who does so. B is then called into the room, and T again acknowledges the paper as his will, and requests B to attest it, who does so, C being present when T acknowledges the paper to B, but not subscribing it, and not recognizing his subscription at that time; the whole, however, being done within a few minutes. The will is duly attested. *Ibid.*

54. A will appearing upon its face to have been made by a married woman, if it has been regularly admitted to probat in the proper court, its validity cannot be questioned in a collateral suit. *Robinsons v. Allen et als.*, 11 Grat. 785.

## CONSTRUCTION OF.

1. A testator gives an express estate in fee, in real and personal property to each of his five sons, and then directs that, "if any or either of his five sons should die without issue living at the time of his death, all the estate, real or personal, of every such child, shall be divided equally between the survivors or their representative, according to the principles of the law of descents." On the death of one of the sons without issue, the estate passes to the surviving children and to the descendants of such as are dead, the latter taking *as purchasers* under the will, the share which the parent would have taken, if alike. *Dickinson v. Hoomes*, 1 Grat. 301.

2. Testatrix says, "I will that all my negroes be hired out until all my just debts are paid, as well as legacies hereinafter devised shall be satisfied." In a subsequent clause, she says, "I will and devise that all my negroes be liberated after the above items in this will be satisfied." This will operates to emancipate not only her slaves in possession, but her portion of slaves held jointly with others, subject to a life estate in a third person. *Binford's adm'r v. Robin*, 1 Grat. 327.

3. Child to whom parent had given slaves in his lifetime, required under

the construction of his will to account for them and their increase, as of their value at the time of the division of the estate. *Kean v. Welsh*, 1 Grat. 403.

4. If any of the slaves have died, the loss to be borne by the estate. If any have been sold their value at the time of the sale to be taken. *Ibid.*

5. A testator says: "In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution among our dear children, as she may think proper. My whole estate real and personal are left in fee simple to her; only requesting her to make an equal distribution amongst our heirs; and desiring her to do for some of my faithful servants whatever she may think will most conduce to their welfare, without regard to the interest of my heirs. Of course I wish first of all that all my debts shall be paid." HELD: 1st. The widow is invested, subject to the payment of debts, with the legal title to the whole estate, real and personal. 2nd. She takes the beneficial interest in the estate for life. 3rd. The children take a vested remainder in fee, in the estate, to commence, in possession at the widow's death, or earlier at her election. 4th. The widow may make advancements to the children at her discretion, so that they ultimately receive an equal share of the estate. 5th. She may employ a reasonable portion of the estate for the benefit of the slaves. 6th. She has power to sell any portion of the estate, real or personal, for payment of debts, or more convenient enjoyment, advancement or division. *Harrisons v. Harrisons' adm'r*, 2 Grat. 1.

6. G. L. by her will, emancipates certain of her slaves, and then says: "All the rest of my slaves I lend to my brother and sister equally during their lives and the life of the survivor; and on the death of the survivor, it is my desire that the said slaves be set free." The slaves alive at her death, and their descendants born during the lives of the brother and sister, and the life of the survivor, and those born after the death of the survivor, are emancipated by the will. *Lucy et als. v. Cheminant's adm'r*, 2 Grat. 36.

7. A testator bequeaths a female slave to his daughter, "not as a bound slave, but to be under her care and tuition, to receive wages for her labor. And if she should have children, for them to come under the same regulation after they pay for their raising. But their labor to be equally divided amongst all my children, if they choose to employ them." 1st. The slaves are not emancipated. 2nd. The bequest to the daughter is void. 3rd. The testator is intestate as to these slaves. *Wynn et als. v. Carroll et als.*, 2 Grat. 227.

8. The language of a will is: "I give and bequeath to my loving wife the land her father gave me, being, &c. I also give unto my said wife the following slaves, to wit: Winney, &c., during her natural life, to be dis-

posed of at her own discretion, either by deed or will, among my children." The wife has a fee in the land. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

9. Every part of a will may be looked to to ascertain the intention of the testator in a particular devise, and thus limit the phrase "dying without issue" to a dying without issue living at the death of the devisee. *Lucas and wife v. Duffield*, 6 Grat. 456.

10. A executed a bond for a certain sum to aid in paying the debts of C. college, upon condition that like pledges to the whole amount of the college debt were obtained, and that this fact should be announced by a committee, of which he was one. He dies before the announcement by the committee, and by his will says he is bound and willing to pay his bond, provided the pledges given shall appear to be indubitably valid, and the whole amount pledged shall first be paid. The will does not contemplate the payment of the bond for any other object than the discharge of the college debts, but adds another condition to the payment, and does not give any additional force to the bond. *Columbian College v. Clopton's adm'r, &c.*, 7 Grat. 168.

11. The provision of the will is not a bequest of the amount of the bond to the college. *Ibid.*

12. A. by his will, says: If C. college should fail, I will that the sum pledged to that, shall be given to N. institution. This is not a request by implication to C. college. *Ibid.*

13. A testator by one clause of his will says, I loan to my daughter M a negro girl C and 200 dollars in cash, which is her full share of my estate. By a codicil in his will he says, I loan to my daughter M 300 dollars in lieu of a negro girl named C which I loaned her in my will. M takes the absolute interest in the legacy. *Parker and wife v. Wasley's ex'or et als.*, 9 Grat. 477.

14. Every part of a will is to be considered in ascertaining the construction of one of the legacies in it. *Ibid.*

15. A devise of a plantation on which testator resided, held to carry with it a coal property which was on the same tract of land, but which was leased separately at the time of making the will. *Dabney et als. v. Cottrell's adm'r et als.*, 9 Grat. 572.

16. A bequest of "all the money," held to include money deposited in a savings institution, but not debts due the testator. *Ibid.*

17. D and A have each five children, and R is the child of A. Testator regards R with great favor, and gives him a farm and a legacy of \$2000. Testator then says, I bequeath to the children of A and D and to R all the funds remaining after every just claim against my estate has been satisfied,

to be equally divided between them. The fund is to be divided into ten parts, one of which is to be given to each of the children of A and D, thus giving to R but one-tenth of the fund. *McMaster v. McMaster's ex'ors*, 10 Grat. 275.

18. In construing a provision in a will, the whole instrument is to be looked to, to ascertain the intention of the testator. *Cheshire v. Purcell*, 11 Grat. 771.

19. In construing a will, if the language be popular and ordinary, its meaning is to be construed according to its usual acceptations; if technical legal terms are used, they are to be construed in the sense which the law affixes to them. *Robinson v. Allen et als.*, 11 Grat. 785.

---

### NUNCUPATIVE WILLS.

1. A paper intended to be executed as a written will, but not so executed, may be a good nuncupative will, if made under the circumstances and proved by the number of witnesses prescribed by the statute. *Phoebe v. Boggess*, 1 Grat. 129.

2. The word "habitation" in the act 1 Rev. Code ch. 104, §7, p. 377, in relation to nuncupative wills, means "dwelling house." *Nowlin's adm'r et als. v. Scott*, 10 Grat. 64.

3. A testamentary paper signed and acknowledged in the presence of witnesses, who are requested to attest it, and attested by them out of the presence of the testatrix, so that it is not good as a written will, cannot be set up as a nuncupative will. *Reese v. Hawthorn*, 10 Grat. 548.

4. A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will. *Ibid.*

---

### WITNESS.

1. An executor claiming no interest as legatee or devisee under the will, and not being liable for costs, is a competent witness to sustain the validity of the will, under which he acts. *Coalter's ex'or et als. v. Bryan and wife et al s.*, 1 Grat. 18.

2. The grantor in a deed of trust for the benefit of his creditors is a competent witness for the claimant under the deed to prove that the property levied on by an officer under an execution against the grantor is the same conveyed in the deed. *Kevan v. Branch*, 1 Grat. 274.

3. In an action on an indemnifying bond, at the relation of parties claiming under a deed of trust from the debtor in the execution, upon the levy of which the bond was taken, the grantor in the deed is a competent witness for the plaintiffs. *Patteson v. Ford*, 2 Grat. 18.

4. A guarantor without consideration of a bond is a competent witness for the obligors to prove that it was given on an usurious consideration. *Caldwell's ex'or v. McCortney et als.*, 2 Grat. 187.

5. Widow of a testator is a competent witness, between the legatees, in relation to that part of the estate in which she is not interested. *Dickinson v. Dickinson's adm'r et als.*, 2 Grat. 493.

6. On the trial of a convict from the penitentiary for felony, a convict confined there for felony, is a competent witness for the prosecution. *Johnson's case*, 2 Grat. 581.

7. A drawer of a bill for whose accommodation it is accepted is not a competent witness for the acceptors, in an action thereon by the holder against them. *Ford v. Nichols*, 3 Grat. 88.

8. No person is incapacitated from being a witness on account of his religious belief. *Perry's case*, 3 Grat. 632.

9. Persons having less than one-fourth of negro blood are competent witnesses on the trial of a white man. *Dean's case*, 4 Grat. 541.

10. The fact that a witness is of negro descent, if not near enough to exclude him, is not competent evidence to impeach his credibility. *Ibid.*

11. The interest which will render a witness incompetent is an interest not in the question, but in the result of the suit. *Masters v. Varner's ex'ors.*, 5 Grat. 168.

12. Though it is the interest of the witness called to testify in a writ of right, that the boundaries of the land should be fixed as the party calling him claims, he is a competent witness. *Ibid.*

13. On a prosecution for a felony, the counsel for the prisoner will not be allowed on the cross-examination of a witness for the Commonwealth, to ask her "whether she is not generally reported in the community to be a woman of unchaste habits, or whether she was not or had not been unchaste." *Howell's case*, 5 Grat. 664.

14. In such a case the counsel for the prisoner having asked the witness if she was married, will not be allowed to ask her how old her youngest child was, or whether it was not a bastard. *Ibid.*

15. In such case counsel for the prisoner will not be allowed to ask the witness if she had not been found with stolen goods in her possession. *Ibid.*



16. Witness being asked, "if whilst she lived with B, she was not accused of stealing or taking things not her own; and whether, when she left there, she was not followed and the things taken from her?" it was proper for the court to inform her that she was not bound to answer the question. *Ibid.*

17. Although as a general rule, it is improper, after a cause has been submitted to the jury, to introduce new testimony or examine new witnesses; yet for good cause shown, it may be done. In such cases the court must exercise a sound discretion; and when the circumstances of the case make it necessary, either party should be permitted to introduce new testimony or new witnesses. *Ibid.*

18. How a witness for the Commonwealth may be re-examined. *Ibid.*

19. A creditor having paid his debt by a sale of land under a decree against the executor, and the devisees having recovered the land from the purchaser, the creditor is a competent witness for the purchaser to prove his debt was just and the amount thereof, against the devisees. *Hudgin v. Hudgin's ex'ors et als.*, 6 Grat. 320.

20. It is no objection to the competency of a witness that he heard the other witnesses examined, though the witnesses who were sworn were directed to leave the court room. *Hopper, Stiers & Lemmons case*, 6 Grat. 684.

21. A witness will in no case be allowed on the trial of a white man to state what was said by a free negro. *Ibid.*

22. Upon the examination of a witness called to impeach another, the party was not allowed to ask what is the general character of the witness in relation to other matters, as well as to his veracity. *Uhl et als. case*, 6 Grat. 706.

23. A record of the conviction of a witness for petty larceny in another State, is not competent evidence to impeach the veracity of the witness. *Ibid.*

24. The attorney for the Commonwealth allowed to recall a witness in a criminal case, and ask him a question, after the attorney had made his opening argument and one of the counsel for the prisoner had spoken in his defence. *Armistead's case*, 7 Grat. 599.

25. Although as a general rule, it is improper after a cause has been submitted to the jury to introduce new testimony or examine new witnesses; yet for the good cause shown, it may be done. In such cases a court must exercise a sound discretion; and when the circumstances of a case make it necessary, either party should be permitted to introduce new testimony or new witnesses. *Livingston's case*, 7 Grat. 658.

26. In a writ of unlawful detainer, the defendant claiming title under a

deed made to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession. *Adams v. Martin*, 8 Grat. 107.

27. A witness called to prove the handwriting of a paper offered for probat may be impeached by proof of what she has said about that paper at another time. But neither her capacity to judge of the handwriting nor her credit is to be impeached by what she may have said about some other paper. *Nuckol's adm'r v. Jones*, 8 Grat. 267.

28. In a controversy between the obligor and assignee of a bond, the obligee is not a competent witness to prove usury in the bond. *Wise v. Lamb*, 9 Grat. 294.

29. The affidavit of a witness of his inability to attend the court, not having been objected to in the court below for want of notice, that objection cannot be made in the appellate court. *Taylor v. Smith*, 10 Grat. 557.

30. Such affidavit taken eight days before the cause is called for trial, is sufficient to authorize his deposition which has been taken for *de bene esse*, to be read as evidence. *Ibid.*

31. Two persons being jointly indicted for the same offence, and being tried separately, one is not an incompetent witness for the other by reason of the joint indictment. *Lazier's case*, 10 Grat. 708.

32. A witness for the prisoner on a trial for felony, who has given evidence at a former trial, is absent from the Commonwealth at the second trial. It is not competent for the prisoner to prove what the witness swore to on the first trial. *Brogg's case*, 10 Grat. 722.

33. A witness is called who is objected to as being interested, and proof *aliunde* of his interest as introduced. He is then examined on his *voir dire* by the party calling him, to show that he has no interest, and this is objected to by the other party; but before he is sworn in chief, a deed is produced which shews he has no interest. If it was error to examine him on his *voir dire*, it was cured by the proof of his want of interest before he was sworn in chief. *Harrison v. Middleton*, 11 Grat. 527.

34. Slaves are bequeathed to one for life, and on his dying without heirs, over to another. In a controversy between the contingent legatee and a purchaser under the legatee for life, who was one of two executors, the other executor is a competent witness for the contingent legatee, to prove the assent of the executors to the legacy for life. *Frazer's adm'r v. Beville et als.*, 11 Grat. 9.

35. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in

question, or for the purpose of having it admitted to record. *Johnston and wife v. Slater et al.*, 11 Grat. 321.

36. A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another. But he must then speak from his own recollection thus refreshed. *Harrison v. Middleton*, 11 Grat. 527.

37. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer to the courses and distances on the diagram, though he may not be able to remember them independently of it. The diagram is itself evidence, and he may point out on it the lines he ran. *Ibid.*

38. An extract or copy from his field notes taken by a surveyor is not evidence; and he can only use it to refresh his memory, and he must then speak from his recollection. *Ibid.*

---

### WRIT OF ERROR.

1. A writ of error *coram vobis* does not lie in the court of appeals. *Reid's adm'r v. Strider's adm'r.*, 7 Grat. 76.

2. The court of appeals has no jurisdiction to grant a writ of error in a criminal case.\* *Bell v. The Commonwealth*, 7 Grat. 201.

3. A writ of error in a criminal cause may be awarded by the court of appeals during the term, returnable to a day in the same term; and the cause may be heard at the same term. *Lazier's case*, 10 Grat. 708.

4. On a prosecution for selling ardent spirits by retail, to be drank where sold, without having obtained a license to keep an ordinary, a writ of error lies for the Commonwealth to the judgment of an inferior court. *Scott's case*, 10 Grat. 749.

See APPEALS AND JURISDICTION.

---

### WRIT OF RIGHT.†

1. Entry and actual possession under a grant, is not necessary to maintain a writ of right. *Taylor's devisees v. Burnsides*, 1 Grat. 165.

2. On the trial of a writ of right, the tenant has a right to open and conclude the argument before the jury. *Overton's heirs v. Davisson*, 1 Grat. 211.

\* Jurisdiction given to Court of Appeals by Sess. Acts, 1852, Chap. 61, § 1.

† Abolished Code of Virginia, Ch. 135, § 38, p. 563. Ejectment given instead, Code Ch. 135, § 2, p. 558.

3. A writ of right brought against a life tenant, may be revived against his heirs, though they claim the land, not under the life tenant, but a third person. And they may defend the action by shewing title in themselves, however derived. *Davis et als v. Teays et als.*, 3 Grat. 283.

4. The act, Sup. Rev. Code, 159-'60, authorizing a defendant in an ejectment or writ of right to set up an equitable title as a defence to the action, limits the defence to cases where the whole contract and its precise terms are manifested by plain written evidence. The written contract itself must be produced to the jury, and parol evidence of its contents is inadmissible, though it may have been lost or destroyed. *Ibid.*

5. The equitable defence under this statute, is also limited to mortgages and deeds of trust, where the mortgage money has been fully paid, or the trust completely performed, or to sales where the vendee has paid all the purchase money and performed everything incumbent on him, so as to entitle him to specific execution of the contract in equity, and a conveyance of the legal title, without any condition proper in equity to be on him imposed. It must be a sale, and not a partnership in the acquisition of the land; and the terms of the contract must be plain. *Ibid.*

6. The holder of the legal estate is the proper defendant in a writ of right, though the land is held by another under a perpetual lease, the title not having passed. *Carrington et als. v. Otis et als.*, 4 Grat. 235.

7. Under the statute, such damages may be recovered in a writ of right as might be recovered in trespass for *mesne* profits. And the statute of limitations may be given in evidence on the trial, and the recovery of *mesne* will be for five years before the writ of right brought, to the recovery of possession. *Purcell and wife et als. v. Wilson*, 4 Grat. 16.

8. In a writ of right there is a special verdict which finds that the parties claim in fee from A, the demandants by deed of trust, and the tenant by subsequent equitable title and possession. This is a substantial finding of the seisin of the demandants, or at least estops the tenant from denying it. *Creigh's heirs v. Henson*, 10 Grat. 231.

9. In a writ of right, the failure to file a plea is error not cured by a verdict for the tenant. *Rowans v. Givens*, 10 Grat. 250.

10. In a writ of right, the writ and count are against four persons by name. The plea states the surname of one of the four differently, but it speaks of them as the aforesaid, &c., referring to the persons mentioned in the count. The replication to the plea gives the name as in the count. After verdict for the tenant it is too late to object to this error, if it be such. *Bell's heirs v. Snyder et als.*, 10 Grat. 350.

11. In a writ of right, the demandants claim, as heirs of B, the patentee of the land; and they claim upon the seisin of their ancestors. They must prove that they are the heirs of B. *Ibid.*

12. In the pleadings and verdict the demandants are spoken of as the heirs of B. This does not prove that they are the heirs. *Ibid.*

13. The report of the surveyor who made the survey under an order in the cause, speaks of one of the demandants as heir of B. This is not evidence that he is such heir. *Ibid.*

14. In a writ of right, the tenant, to defend his possession under the statute of limitations, may show a possession anterior to his patent; and to show color of title, may introduce the entry and survey, upon which his patent issued. But as there cannot be an adversary possession against the Commonwealth, he cannot show possession further back than the senior grant. *Koiner v. Rankin's heirs*, 11 Grat. 420.

15. The quantity and boundaries of the land described in the count and the verdict vary from each other, but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in the count is a mistaken description, and that the land recovered is the land demanded. *Ibid.*



## LIST OF CASES,

ARRANGED ALPHABETICALLY IN THE NAMES OF BOTH  
PLAINTIFFS AND DEFENDANTS, WITH THE PAGES  
IN GRATTON'S REPORTS WHERE THE CASES ARE  
REPORTED.

- ABBOTT et als. *and* Stuart's ex'ors, 9 Grat. 252.  
ABRAHAM et als. *and* Washington's ex'ors, 6 Grat. 66.  
ADAMS & McCorcle *and* Caperton, 5 Grat. 177.  
    *v.* Martin, 8 Grat. 107.  
ADCOCK'S Case, 8 Grat. 661.  
AILSTOCK'S Case, 3 Grat. 650.  
ALEXANDER *and* Gaines' adm'r, 7 Grat. 257.  
    *& Co. v.* Newtown et als, 2 Grat. 266.  
ALFORD *v.* Helms, 6 Grat. 90.  
ALLEN & wife *and* Dejarnette, 5 Grat. 499.  
ALLEN *v.* The Commonwealth, 6 Grat. 529.  
    *& Ervine v.* Morgan's adm'r et als., 8 Grat. 60.  
    *&c., and* Wadsworth et als., 8 Grat. 174.  
    Walton & Co. *v.* Hamilton, 9 Grat. 255.  
    *& others and* Robinson, 11 Grat. 785.  
ALLSTADT et als. *and* Henkle's ex'x, &c, 4 Grat. 284.  
ALMOND & wife *v.* Mason's adm'r et als, 9 Grat. 700.  
ANDERSON, adm'r. &c. *v.* Burwell's ex'or, 6 Grat. 405.  
    et als. *v.* Soer, 6 Grat. 363.  
    et als. *v.* Gallego's adm'r et als, 6 Grat. 363.  
ANDERSON *v.* Harvey's heirs, 10 Grat. 386.  
ANGLEA'S Case, 10 Grat. 696.  
ANGLIN *v.* Bottom, 3 Grat. 1.  
ANNAT'S adm'r *and* Rice's ex'or, 8 Grat. 557.  
APPERSON *and* Shackelford, 6 Grat. 451.  
APPLING *v.* Eades, 1 Grat. 286.  
ARCHER'S Case, 6 Grat. 705.  
    *and* Galt, 7 Grat. 307.  
    adm'r et als. *and* Tabb's adm'r, 7 Grat. 408.  
    *v.* Archer's adm'r, 8 Grat. 539.  
    *v.* Ward, 9 Grat. 622.  
    *v.* Commonwealth, 10 Grat. 627.  
ARMSTEAD'S Case, 7 Grat. 599.  
    *v.* Hundley, 7 Grat. 52.  
    adm'r et als. *and* Sheldon et als, 7 Grat. 264.  
ARMSTRONG et als. *and* Nelson's adm'r, 5 Grat. 354.  
    heirs *v.* Walkup et als, 9 Grat. 379.  
    *v.* Stone & wife, 9 Grat. 102.  
ARNSTHALL *and* Levy, 10 Grat. 631.  
ARTHUR et als. *and* Bank of Washington, 3 Grat. 173.  
ASH *v.* Way's adm'r et als, 2 Grat. 203.  
ASHER *v.* Pendleton et als, 6 Grat. 628.  
ASHLEY et als. *and* Fletcher & wife, 6 Grat. 332.  
ASHWELL *v.* Ayres et als, 4 Grat. 283.  
ATKINSON *v.* Christian, 3 Grat. 448.

- AUSTIN** *v.* Richardson, 1 Grat. 310.  
     *et al. v.* Graham, 2 Grat. 273.  
**AYRES'** Case, 6 Grat. 668.  
     *et als. and* Ashwell, 4 Grat. 283.  
     *and* Price's ex'ors, 10 Grat. 575.  
**AYLETT** *v.* Roane, 1 Grat. 282.
- BACON'S** Case, 7 Grat. 602.  
**BAGWELL** *et als. and* Spence, 6 Grat. 444.  
**BAILEY** *v.* Butcher, 6 Grat. 144.  
     *and* Gentry *et als.*, 6 Grat. 594.  
     *v.* James, 11 Grat. 468.  
**BAILEY'S** adm'r *v.* Robinsons, 1 Grat. 4.  
**BALDWIN** *v.* Darst, 3 Grat. 132.  
**BALL** *et als. v.* Johnson's ex'or *et als.*, 8 Grat. 281.  
     *and* Satterwhite *ex parte*, 2 Grat. 588.  
**BALTIMORE & Ohio R. R. Co. and** Kidwell, 11 Grat. 676.  
**BANK** of U. S. *v.* Beirne, 1 Grat. 234.  
     *of* Washington *v.* Arthur *et als.*, 3 Grat. 173.  
         *v.* Hupp, 10 Grat. 23.  
     *of* Virginia *and* Raine, 4 Grat. 150.  
     *of* U. S. Beirne *et als.*, 1 Grat. 539.  
     *of* Virginia *et als. and* Overseers of the poor, 2 Grat. 544.  
         *v.* Robinson, 5 Grat. 174.  
         *et als. and* Reynolds, 6 Grat. 174.  
         *and* Stainback, 11 Grat. 260.  
         *and* Stainback, 11 Grat. 269.  
     *of* Potomack *et als. and* M'Laughlin, 7 Grat. 68.
- BANKHEAD and** French, 11 Grat. 136.  
**BARBEE & Co. v.** Pannill, &c., 6 Grat. 442.  
**BARKER** *v.* Barker's adm'r, 2 Grat. 344.  
**BARLEY and** McKee, 11 Grat. 340.  
**BARNETT** *et als. and* Harris' ex'ors, 3 Grat. 339.  
     *v.* Meredith, Judge, 10 Grat. 650.  
**BASSETT'S** adm'r *v.* Cunningham's adm'r, 9 Grat. 684.  
**BAUGH & Sequine and** Harper & Weston, 9 Grat. 508.  
**BEACH** *v.* Trudgain *et als.*, 2 Grat. 219.  
**BEAL** *et als. and* Taylor, 4 Grat. 93.  
**BEALE** *v.* Digges *et als.*, 6 Grat. 582.  
     adm'r *v.* Botetourt, Justices for, &c., 10 Grat. 278.  
     *and* Bush, 1 Grat. 229.  
**BEALE'S** adm'r *v.* Taylor's adm'r *et als.*, 2 Grat. 532.  
**BEAN & another v.** Simmons, 9 Grat. 389.  
**BEAZLEY and** Stubblefield, 5 Grat. 51.  
**BECKLEY** *v.* Palmer *et als.*, 11 Grat. 625.  
**BEERY** *v.* Homan's Committee, 8 Grat. 48.  
**BEIRNE and** Bank U. S., 1 Grat. 234.  
     *et als. and* Bank U. S., 1 Grat. 539.  
     *and* Union Bank of Maryland, 1 Grat. 226.  
     ex'or *et al. v.* Campbell, 4 Grat. 124.
- BELL'S** Case, 7 Grat. 646.  
     Case 7 Grat. 201.  
         8 Grat. 600.  
     *v.* Crawford, 8 Grat. 110.  
     *et al. v.* Calhoun, 8 Grat. 22.  
     heirs *v.* Snyder *et als.*, 10 Grat. 350.  
**BENTLEY'S** *et als. v.* Harris' adm'r, 2 Grat. 357.



- BERRY *v.* Ensell et als, 2 Grat. 333.  
 BETTY *v.* others *and* Smith's adm'r, 11 Grat. 752.  
 BEVERLEY *v.* Brooks et als. 4 Grat. 187.  
     *v.* Scott et. als. 4 Grat. 240.  
 BEVILL et als. *and* Frazier's adm'r 11 Grat. 9.  
 BILLUPS *v.* Sears et als. 5 Grat. 31.  
 BINFORD'S adm'r *v.* Bobin, 1 Grat. 327.  
 BIRCHETT *and* Sturdivant et als, 10 Grat. 67.  
 BLACKFORD & SON *and* McCormick, 4 Grat. 133.  
 BLAIR *v.* Thompson et als. 11 Grat. 441.  
 BLAKENEY *and* United States, 3 Grat. 405.  
 BLEVIN'S Case, 5 Grat. 703.  
 BOAK *and* Lee's ex'or, 11 Grat. 182.  
 BOARD *and* Staats, 10 Grat. 400.  
 BOARD of Public Works *and* Enders, 1 Grat. 364.  
 BAYGESS *and* Phoebe, 1 Grat. 129.  
 BOLLING et als. *and* Fleming et als, 8 Grat. 292.  
 BOOTH'S Case, 4 Grat. 525.  
 BOOTH *v.* Kesler, 6 Grat. 350.  
     *v.* Kinsey, 8 Grat. 560.  
 BOTETOURT Justices for, &c., *and* Beale's adm'r, 10 Grat. 278.  
 BOTTOM *and* Anglin, 3 Grat. 1.  
 BOURLAND *v.* Eidson, 8 Grat. 27.  
 BOURNE'S ex'or *v.* Mecbau's adm'r, 1 Grat. 292.  
 BOWLES *v.* Woodson, 6 Grat. 78.  
     ex'or *v.* Elmore's adm'r, 7 Grat. 385.  
 BOWMAN *and* Moffet, 6 Grat. 219.  
 BOWYER *v.* Hughart et al. 9 Grat. 336.  
     *v.* Hewitt, Ruffner & Co., 2 Grat. 193.  
 BOWYER'S adm'r et als. *v.* The Giles, Fayette and Kan. Turnpike Co., 9  
     Grat. 109.  
 BOYCE, adm'r. &c., *v.* Smith, 9 Grat. 704.  
 BOYD'S ex'ors *v.* Boyd's heirs, 3 Grat. 113.  
 BOYD, Trustee, &c. et als. *and* Fry & Co., 3 Grat. 73.  
 BOYD'S adm'r *v.* Overby, 11 Grat. 202.  
 BRADSHAW et als. *and* Evans, 10 Grat. 207.  
 BRAGG *and* Wootton, 1 Grat. 1.  
 BRANCH *and* Kevan, 1 Grat. 274.  
 BRANSCUM *and* Hale, 10 Grat. 418.  
 BRAXTON *v.* Wood's adm'r, 4 Grat. 25.  
     adm'r, &c. *v.* Harrison's ex'ors, 11 Grat. 30.  
 BRECKENRIDGE & Crawford *and* Pitman, 3 Grat. 127.  
 BRENT *v.* Richards, 2 Grat. 539.  
 BREWER *v.* Harris et als, 4 Grat. 285.  
 BROCK *and* Janes et als. 10 Grat. 211.  
 BROGY'S Case, 10 Grat. 722.  
 BROOK *v.* Washington, 8 Grat. 248.  
     *v.* Wilcox, 11 Grat. 411.  
 BROOKE et als. *and* Beverley, 4 Grat. 187.  
     *v.* Croxton and wife et als, 2 Grat. 506.  
 BROUGH *v.* Higgins et als, 2 Grat. 408.  
 BROWN *v.* George, 6 Grat. 424.  
 BROWN'S ex'ors et als. *and* Parker's ex'ors, 6 Grat. 554.  
 BROWN *and* Clark, 8 Grat. 549.  
     et als. *and* Michaux's adm'r, 10 Grat. 612.  
 BROWNING *and* Price, 4 Grat. 68.  
 BRUCE et als. *and* Frederick Justices, 4 Grat. 281.

- BRYAN *v.* Salyard's et als, 3 Grat. 188.  
     *v.* Stump 8 Grat. 241.  
     *and* wife *v.* Coalter's ex'or, 1 Grat. 18.  
     *v.* McCulloch, 2 Grat. 175.  
 BUCHANAN *and* Wilson, 7 Grat. 334.  
     *v.* Clark et als, 10 Grat. 164.  
 BUMGARDENER, guardian, *and* Sillings et als, 9 Grat. 273.  
 BURBRIDGE *v.* Higgins' adm'r, 6 Grat. 119.  
 BURCH *and* Cordle, 10 Grat. 480.  
 BURCH'S adm'r *and* Markle's adm'r et als, 11 Grat. 26.  
 BURFOOT treasurer *and* Wilson et als, 2 Grat. 134.  
 BURNSIDES *and* Taylor's devisees, 1 Grat. 165.  
 BURR'S Case, 4 Grat. 534.  
     ex'or et als *v.* McDonald et als, 3 Grat. 215.  
 BURWELL'S ex'ors *and* Anderson, adm'r, &c., 6 Grat. 405.  
 BUSH *v.* Beale, 1 Grat. 229.  
 BUTCHER'S Case, 4 Grat. 544.  
 BUTCHER *and* Bailey, 6 Grat. 144.  
     *v.* Creel's heirs, 9 Grat. 201.  
 BUZZARD'S Case, 5 Grat. 694.  
  
 CABANESS *v.* Matthews et als, 2 Grat. 325.  
 CADY'S Case, 10 Grat. 776.  
 CALDWELL'S ex'ors *v.* McCortney et als, 2 Grat. 187.  
 CALES *v.* Miller et als, 8 Grat. 6.  
 CALHOUN'S ex'or *and* Patton's ex'ors, 4 Grat. 138.  
 CALHOUN *and* Bell et al, 8 Grat. 22.  
     *v.* Palmer, 8 Grat. 88.  
 CALLIS et als. *v.* Kemp et als, 11 Grat. 78.  
 CAMPBELL et als. *and* Turner *and* wife, 3 Grat. 77.  
     *and* Beirne's ex'ors et als, 4 Grat. 125.  
     *and* Nichols, 10 Grat. 560.  
     *and* Thralkeld's, 2 Grat. 198.  
 CAPERTON *v.* McCorkle & Adams, 5 Grat. 177.  
 CAPERTON'S ex'ors et als *and* Lewis et als, 8 Grat. 148.  
 CAPERTON et al *v.* Gregory et als, lessee, 11 Grat. 505.  
 CARNEY'S Case, 4 Grat. 546.  
 CARPENTER *and* wife *v.* Utz et als, 4 Grat. 270.  
 CARPER et als. *v.* McDowell, 5 Grat. 212.  
 CARR'S adm'r *v.* Glasscock's adm'r et als, 3 Grat. 343.  
 CARRELL et als. *v.* Winn et als, 2 Grat. 227.  
 CARRINGTON et als. *v.* Otis et als, 4 Grat. 235.  
     et als. *v.* Didier, Norvell & Co., 8 Grat. 260.  
 CARROLL et als. *v.* Tiffany, 9 Grat. 289.  
 CARTER et als. *and* Withers, 4 Grat. 407.  
     et als. *and* Stafford, 4 Grat. 63.  
     et als. *and* Elliott, 9 Grat. 541.  
 CATLETT *and* Millers, 10 Grat. 477.  
 CAUTHORN *v.* Courtney, 6 Grat. 381.  
 CECIL *v.* Early et als, 10 Grat. 198.  
 CHAMBERS *and* Swope, 2 Grat. 319.  
 CHANCELLOR *and* Wellford et als, 5 Grat. 39.  
 CHAPMAN *v.* Dunlap, 4 Grat. 86.  
     *and* Smith et al, 10 Grat. 445.  
 CHARLES *v.* Charles, 8 Grat. 486.  
 CHARLTON *v.* Unis, 4 Grat. 58.  
     adm'r. *and* Smith's adm'r, 7 Grat. 425.

- CHEMINANT'S adm'r's *and* Lucy, 2 Grat. 36.  
 CHESAPEAKE & Ohio Canal Co., *v.* Hoge et als, 2 Grat. 511.  
 CHESHIRE *v.* Purcell, 11 Grat. 771.  
 CHINN et als. *v.* Murray et als, 4 Grat. 348.  
 CHRISTIAN'S Case, 7 Grat. 631.  
     *and* Atkinson, 3 Grat. 448.  
     et als. *and* Watts, 3 Grat. 518.  
 CHRISTIAN *v.* Ellis, 1 Grat. 396.  
 CLARK'S Case, 6 Grat. 675.  
     *v.* Wells adm'r, 6 Grat. 475.  
     *v.* Hardgrove et als, 7 Grat. 399.  
     *v.* Brown, 8 Grat. 549.  
     et als. *and* Buchanan, 10 Grat. 164.  
     *v.* M'Clure, 10 Grat. 305.  
 CLAYCOMB'S legatees, *v.* Claycomb's ex'or, 10 Grat. 589.  
     *v.* Curtis, 1 Grat. 289.  
 CLELAND *v.* Watson, 10 Grat. 159.  
 CLERE'S Case, 3 Grat. 615.  
 CLINE *and* Compton, 5 Grat. 137.  
     heirs *and* Reed, 9 Grat. 136.  
 CLOPTON'S adm'r, &c., *and* Columbian College, 7 Grat. 168.  
 CLORE'S Case, 8 Grat. 606.  
 CLOUGH &c. *v.* Thompson, 7 Grat. 26.  
 COALTER'S ex'or *v.* Bryan and wife, &c., 1 Grat. 18.  
 COBBS et als. *and* Tapscott, 11 Grat. 172.  
 COCKERELL et als. *and* Hopkins adm'r, 2 Grat. 88.  
 COCKRAN *and* Trice, 8 Grat. 442.  
     *v.* Paris et als. 11 Grat. 348.  
 COINER *and* Porterfield, 4 Grat. 55.  
 COLE'S Case, 5 Grat. 696.  
     et als. *and* Welles, 6 Grat. 645.  
 COLEMAN *and* White, 6 Grat. 138.  
     & wife *and* Snead, 7 Grat. 300.  
 COLSTON *and* Orrick, 7 Grat. 189.  
 COLUMBIAN COLLEGE *v.* Clopton's adm'r, &c., 7 Grat. 168.  
 COLVIN *and* Eoberts, 3 Grat. 358.  
     *v.* Menifee, 11 Grat. 87.  
 COMMONWEALTH *and* Allen, 6 Grat. 529.  
     *and* Archer, 10 Grat. 627.  
     *and* Doss, 1 Grat. 557.  
     *and* Slaughter adm'r, 2 Grat. 391.  
     *and* Hamlett, 3 Grat. 82.  
     *and* Saunder's adm'r, 3 Grat. 214.  
     *and* Saunders, 10 Grat. 494.  
     *v.* Yates, 9 Grat. 693.  
     *v.* Moore's adm'r, 1 Grat. 294.  
     *v.* Ricks et als, 1 Grat. 416.  
     *v.* Peyton's adm'r, 2 Grat. 393.  
 COMTON *v.* Cline, 5 Grat. 137.  
 CORNELL'S Case, 3 Grat. 587.  
 COOK, SHERIFF et als. *v.* Hays, 9 Grat. 142.  
 COOKUS *v.* Peyton's ex'or, 1 Grat. 431.  
 CORDLE *v.* Rurch, 10 Grat. 480.  
 CORNWELL *and* Higginbotham, 8 Grat. 83.  
     *and* Nelson's adm'r, 11 Grat. 724.  
 COTTRELL adm'r et als. *and* Dabney et als, 9 Grat. 572.  
 COUNTS et als. *and* McReynold, 9 Grat. 242.

- COURTNEY *and* Cauthorn, 6 Grat. 381.  
 COUSINS *and* Parker, 2 Grat. 372.  
 COWLES *and* Howell, &c., 6 Grat. 393.  
 COX *et als.* *and* Schofield, 8 Grat. 533.  
     &c. *v.* Romine, 9 Grat. 27.  
     *et als.* *v.* Thomas adm'r 9 Grat. 312.  
     *et als.* *v.* Thomas adm'r 9 Grat. 323.  
 CRAIG *v.* Sebrell, 9 Grat. 131.  
 CRALLE *et als.* *v.* Meem *et als.*, 8 Grat. 496.  
 CRAWFORD *and* Williamson, 7 Grat. 202.  
     *and* Bell, 8 Grat. 110.  
     *v.* Morris, 5 Grat. 90.  
     *and* McDowell ex'or, 11 Grat. 377.  
     ex'or *v.* Patterson, 11 Grat. 364.  
 CREEL'S heirs *and* Butcher, 9 Grat. 201.  
 GREGOR'S Case, 7 Grat. 591.  
 CREIGH'S heirs *v.* Henson, 10 Grat. 231.  
 CREWS *and* Davis, 1 Grat. 407.  
 CRISS *and* Gross, Myers & Moore, 3 Grat. 262.  
 CROSS' curatrix *v.* Cross' legatees, 4 Grat. 257.  
 CROFT *et als.* *v.* Croft, ex'or, &c., 4 Grat. 103.  
 CROUCH *et als.* *v.* Dabney 2 Grat. 415.  
 CROW & wife *and* Hale, 9 Grat. 263.  
 CROXTON & wife *et als.* *and* Brooke, 2 Grat. 506.  
 CRUMP *et als.* *v.* Redd's adm'r *et als.*, 6 Grat. 372.  
     *v.* U. S. Mining Co., 7 Grat. 352.  
 CUNNINGHAM'S Case, 6 Grat. 695.  
     *v.* Cunningham, 4 Grat. 43.  
     & Wife *et als.* *and* Norman's ex'n, 5 Grat. 63.  
     adm'r *and* Bassett's adm'r, 9 Grat. 684.  
     *v.* Smith *et al.*, 10 Grat. 255.  
 CURD *v.* Miller's ex'ors, 7 Grat. 185.  
 CURRAN'S Case, 7 Grat. 619.  
 CURRIN *and* Hoge, 3 Grat. 201.  
     *et als.* *v.* Spruall *et als.*, 10 Grat. 145.  
 CURTIS *and* Clark 1 Grat. 289.  
  
 DABNEY *and* wife *v.* Kennedy, 7 Grat. 317.  
     *et als.* *v.* Cottrell's adm'r *et als.*, 9 Grat. 572.  
     *and* Crouch *et als.*, 2 Grat. 415.  
     *v.* Knapp, Preston & Co., 2 Grat. 354.  
 DALBY *and* Literary Fund, 4 Grat. 528.  
 DALY, assignee, *and* Tucker, 7 Grat. 330.  
 DANCE *et als.* *v.* Seaman *et als.*, 11 Grat. 778.  
 DARST *and* Baldwin, 3 Grat. 132.  
 DAVIS *v.* Crews, 1 Grat. 407.  
     *v.* Davis, 2 Grat. 363.  
     *et als.* *v.* Teays *et als.*, 3 Grat. 283.  
     *and* Smith, 4 Grat. 50.  
     *v.* Turner, 4 Grat. 422.  
     *et als.* *and* Poindexter, &c., 6 Grat. 481.  
     *et als.* *and* Hogue, 8 Grat. 4.  
 DAVISSON *and* Overton's heirs, 1 Grat. 211.  
 DAWSON *and* Rivanna Nav. Co., 3 Grat. 19.  
     *and* wife *and* Thomas, 9 Grat. 531.  
 DAY'S case, 2 Grat. 562.  
     Case, 3 Grat. 629.

- DAY and Robinson's ex'ors, 5 Grat. 55.  
     et als. and Farmers' Bank, 6 Grat. 360.  
 DEAN'S Case, 4 Grat. 541.  
 DEJARNETTE v. Allen and wife, 5 Grat. 499.  
 DENEUFVILLE'S adm'r v. Travis' adm'r, 5 Grat. 28.  
 DENHAM'S heirs and Rogers, 2 Grat. 200.  
 DEPRIEST et als. and Rosser, ex'or of Wood, 5 Grat. 374.  
 DESHAZO and Yarbrough and wife, 7 Grat. 374.  
 DESHIELDS and Jameson's adm'r, 3 Grat. 4.  
 DESOER and Anderson et als., 6 Grat. 363.  
 DEVERS v. Ross, 10 Grat. 252.  
 DICKEY and Reeves, 10 Grat. 138.  
 DICKINSON & CO. and Perkins' trustee, 3 Grat. 335.  
     v. Hoomes, 1 Grat. 302.  
     v. Dickinson's adm'r et als., 2 Grat. 493.  
 DICKINSON'S adm'r and Gray, 4 Grat. 87.  
 DICKINSON v. Smith and Carter, 5 Grat. 135.  
     v. Hoomes, adm'r et als., 8 Grat. 353.  
 DICKINSONS and Roach, 9 Grat. 154.  
 DIDIER, Norvell & CO. and Carrington et als., 8 Grat. 260.  
 DIGGES et als. and Beale, 6 Grat. 582.  
     and Edmunds, 1 Grat. 359.  
 DISMAL Swamp Land Co. v. A. Macaulay's adm'r et als., 7 Grat. 476.  
 DIXON v. Myers & Co., 7 Grat. 240.  
 DOLD'S trustees v. Geiger's adm'r, 2 Grat. 98.  
 DONNALLY and Tyree et als., 9 Grat. 64.  
 DOSS v. Commonwealth, 1 Grat. 557.  
 DOUGLAS' ex'or and Piper, 3 Grat. 371.  
 DOWDY'S Case, 9 Grat. 727.  
 DOWNER & Co. v. Morrison, 2 Grat. 237, 250.  
 DRAKE and Cochran's Case, 6 Grat. 665.  
     v. Lyons, 9 Grat. 54.  
 DUFFIELD and McLaughlin, 5 Grat. 133.  
     and Lucas and wife, 6 Grat. 456.  
 DUNCAN et als. and Pryor, 5 Grat. 27.  
     v. Helms and others, 8 Grat. 68.  
 DUNLAP and Chapman, 4 Grat. 86.  
 DUNN'S adm'or and Mason's ex'or, 5 Grat. 384.  
     adm'or and Wills' adm'or 5 Grat. 384.  
 DUNN and Johnson, 6 Grat. 625.  
 DUNNINGTON'S v. Pres. & Dir. N. W. Turn. Road, 6 Grat. 160.  
 DENHAM et als., and Phippin, 8 Grat. 457.  
 DYE'S Case, 7 Grat. 662.
- EADES and Appling, 1 Grat. 286.  
 EARLY v. Wilkinson and Hunt, 9 Grat. 68.  
     and others and Cecil, 10 Grat. 198.  
 EDLOE et als. and McCandlish adm'or, &c., 3 Grat. 330.  
 EDMUNDS v. Digges, 1 Grat. 359.  
 EIDSON and Bourland, 8 Grat. 27.  
     v. Fontaine, adm'r, &c., et als., 9 Grat. 286.  
     and Lea's ex'or, 9 Grat. 277.  
 ELLIOTT v. Carter et als., 9 Grat. 541.  
 ELLIS and Christian, 1 Grat. 396.  
 ELMORE'S adm'x and Bowles ex'or, 7 Grat. 385.  
 EMERICK, &c., v. Tavener, 9 Grat. 220.  
 ENDERS v. Board of Public Works, 1 Grat. 364.

- ENGLISH et als. *and* Pasley, 5 Grat. 141.  
     *and* Pasley, 10 Grat. 236.  
 ENSELL et als. *and* Berry, 2 Grat. 333.  
     *and* McKinley, sheriff, 2 Grat. 333.  
 EPES' Case, 5 Grat. 676.  
     et als. *and* Myrick's ex'or, 8 Grat. 179.  
 ERSKINE'S Case, 8 Grat. 624.  
 EVANS and wife v. Spurgin, 6 Grat. 107.  
     v. Bradshaw et als., 10 Grat. 207.  
     et als. v. Spurgin et als., 11 Grat. 615.  
 EWELL'S adm'r et als. *and* Hayes, 4 Grat. 11.  
 ✓ EWING'S Case, 5 Grat. 701.
- FAIRFAX v. Fairfax's ex'or, 7 Grat. 36.  
 FALCONER *and* Muire, 10 Grat. 12.  
 FARISH & Co. v. Reigle, 11 Grat. 697.  
 FARMERS' BANK v. Day et als., 6 Grat. 360.  
 FAWVER v. Fawver, 6 Grat. 236.  
 FEAZLE'S Case, 8 Grat. 585.  
 FERGUSON'S Case, 3 Grat. 594.  
 FERGUSON *and* Leake, 2 Grat. 419.  
 FINDLEY'S ex'ors v. Findley, 11 Grat. 434.  
 FISHER et als. *and* Rossett, 11 Grat. 492.  
 FITZHUGH'S ex'ors v. Fitzhugh, 11 Grat. 210.  
     ex'or v. Fitzhugh, 11 Grat. 300.  
 FLANAGAN v. Grimmet et als., 10 Grat. 421.  
 FLEMMING'S v. Riddick's ex'ors, 5 Grat. 272.  
 FLEMING v. Toler, 7 Grat. 310.  
     et als. v. Bolling et als., 8 Grat. 292.  
 FLETCHER and wife v. Ashley et als., 6 Grat. 332.  
     v. Watson, 7 Grat. 1.  
     *and* Watson, 7 Grat. 1.  
 FLINT et als. *and* Smith et als., 6 Grat. 40.  
 FLOYD *and* Strange, 9 Grat. 474.  
 FONES v. Rice et als., 9 Grat. 568.  
 FONTAINE adm'r, &c., et als., *and* Eidson, 9 Grat. 286.  
 FORD v. Nichols & Snyder, 3 Grat. 88.  
     *and* Patteson, 2 Grat. 18.  
 FORKNER v. Stuart, &c., 6 Grat. 197.  
 FORSYTH *and* Newby, 3 Grat. 308.  
 FORWARD'S adm'r v. Thamer, 9 Grat. 537.  
 FOSTER'S Case, 5 Grat. 695.  
 FRANKLIN *and* Rosser, &c., 6 Grat. 1.  
     *and* Tuliaferro, 1 Grat. 332.  
 FRAZIER'S adm'r v. Bevill et als., 11 Grat. 9.  
 FREDERICK JUSTICES v. Bruce et als., 4 Grat. 281.  
 FRENCH v. Townes et als., 10 Grat. 513.  
     v. Bankhead, 11 Grat. 136.  
 FRIEND, &c. v. Woods, 6 Grat. 189.  
     v. Wilkinson & Hunt, 9 Grat. 31.  
     v. Woods, 9 Grat. 37.  
 FRY & Co. v. Boyd, &c., et als., 3 Grat. 73.  
 FRY'S *and* Shepherd, Hunter & Co., 3 Grat. 442.  
 FUGATE'S Case, 6 Grat. 693.  
 FULTON'S ex'ors *and* Irick and wife, 3 Grat. 193.
- GAINES' adm'r v. Alexander, 7 Grat. 257.

- GAINES *and* Thomas, 1 Grat. 347.  
 GALLAHUE *and* Mairs, 9 Grat. 94.  
 GALLEGO'S adm'r et als, *and* Anderson et als., 6 Grat. 363.  
 GALT *v.* Archer, 7 Grat. 307.  
 GALT'S ex'or et als. *v.* Swain, 9 Grat. 633.  
 GARDNER *v.* Neal, 9 Grat. 85.  
     *and* Roach, 9 Grat. 89.  
 GARNER et als'. Case, 3 Grat. 655.  
 GARTH et als. *and* Horseley et als., 2 Grat. 471.  
 GAYLE et als. *and* Williamson, 4 Grat. 180.  
     *and* Williamson, 7 Grat. 152.  
 GEIGER'S adm'r *v.* Harman's ex'x, 3 Grat. 130.  
     *and* Harnsberger's ex'or, 3 Grat. 144.  
     *and* Dold's trustee, 2 Grat. 98.  
 GENTRY et als'. *v.* Bailey, 6 Grat. 594.  
 GEORGE *and* Brown, 6 Grat. 424.  
     *v.* Strange's ex'or, 10 Grat. 499.  
 GIBSON *and* McCarty, 5 Grat. 307.  
 GIBSON'S ex'or *and* Rhea, 10 Grat. 215.  
 GILES, Fayette *and* Kanawha Turnpike Co. *and* Bowyer's adm'r et als., 9 Grat. 109.  
 GILLESPIE et als. *v.* Thompson et als., 5 Grat. 132.  
 GIVENS et als. *and* Wiley et als., 6 Grat. 277.  
     *and* Williams, 6 Grat. 268.  
     *and* Rowans, 10 Grat. 250.  
 GLAZEBROOK'S adm'r *v.* Ragland's adm'r, 8 Grat. 332.  
 GLASCOCK'S adm'r et als. *and* Carr's adm'rs, 3 Grat. 343.  
 GLASSELL *and* Pollock *and* wife, 2 Grat. 439.  
 GOOCHLAND Justices *and* Sampson, 5 Grat. 241.  
 GOODWIN *v.* McCluer, 3 Grat. 291.  
     et als. *and* Williamson's ex'or, 9 Grat. 503.  
 GOOLSBY *ex parte*, 2 Grat. 575.  
 GOVAN *and* Thompson, 9 Grat. 695.  
 GOVERNOR for Clarke *and* McNeale et als., 3 Grat. 299.  
     for Liggart *v.* Withers, 5 Grat. 24.  
     for Bryan *v.* McCulloch et als., 2 Grat. 175.  
     for Leightons *v.* Hinchman, &c., 2 Grat. 156.  
     for Davis *v.* Roach et als., 9 Grat. 13.  
 GRAHAM *v.* Austin et als., 2 Grat. 273.  
 GRAY *and* Hansbrough, 3 Grat. 356.  
     *v.* Dickinson's adm'r, 4 Grat. 87.  
     *v.* Overstreet et als., 7 Grat. 613.  
 GRAYSON'S Case, 6 Grat. 712.  
     7 Grat. 613.  
 GREERS *v.* Wright, 6 Grat. 154.  
 GREER *v.* Greers, 9 Grat. 330.  
 GREGORY et als., lessee, *and* Caperton et al., 11 Grat. 505.  
 GRIFFIN'S ex'or *and* Macauley's adm'r, 4 Grat. 9.  
     ex'or et als. *v.* A. Macauley's adm'r, 7 Grat. 476.  
     *v.* E. Macauley's ex'or, 7 Grat. 476.  
 GRIFFITH et als. *v.* Reynolds, 4 Grat. 46.  
     *v.* Thompson, 4 Grat. 147.  
 GRIMMET et als. *and* Flanagan, 10 Grat. 421.  
 GROSS, Myers & Moore *v.* Criss, 3 Grat. 262.  
 GROVE *and* wife *and* Isler *and* wife, 8 Grat. 257.  
 GWINN et als. *and* Mann, 8 Grat. 58.

- HADEN'S adm'r *and* Ross' ex'or, 7 Grat. 86.  
 HAFFEY, &c. *v.* Miller, &c., 6 Grat. 454.  
 HAGAN, &c. *v.* Wardens, 3 Grat. 315.  
 HAGY *and* others *and* Ragsdale, 9 Grat. 409.  
 HAILSTOCK'S Case, 2 Grat. 564.  
 HAIRSTON, &c. *v.* Medley, 1 Grat. 96.  
 HALE *v.* Crow *and* wife, 9 Grat. 263.  
     *and* Walton, 9 Grat. 194.  
     *v.* Branscum, 10 Grat. 418.  
 HALLAM'S adm'r *and* Oliver's ex'or, 1 Grat. 298.  
 HALL'S Case, 3 Grat. 593.  
     8 Grat. 588.  
 HALL *et als.* *and* Martin, 9 Grat. 8.  
 HAMILTON *and* Allen, Walton & Co., 9 Grat. 255.  
     adm'r *et als.* *and* Hillis, 10 Grat. 300.  
 HAMLETT *et als.* *v.* Commonwealth, 3 Grat. 82.  
 HAMOR *and* Wife's Case, 8 Grat. 698.  
 HAMPTON'S Case, 3 Grat. 590.  
 HAMPTON, Smith & Co. *v.* Michael, 6 Grat. 151.  
 HANCOCK *v.* Richmond & Petersburg Railroad Co., 3 Grat. 328.  
 HANDLEY *et als.* *and* Nickell & Miller, 10 Grat. 336.  
 HANNA *v.* Wilson, 3 Grat. 243.  
 HANNAH *and* Hannon *et als.*, 9 Grat. 146.  
 HANNON *et als.* *v.* Hannah, 9 Grat. 146.  
 HANSBARGER *and* Lemon, guardian, 6 Grat. 301.  
 HANSBROUGH *v.* Gray, 3 Grat. 356.  
 HARDAWAY'S adm'r *and* Worsham, 5 Grat. 60.  
 HARDGROVE, &c. *v.* Clarke, 7 Grat. 399.  
 HARDINGS *and* Upper Appomattox Co., 11 Grat. 1.  
 HARGRAVE *et als.* *and* Peter *et als.*, 5 Grat. 12.  
 HARMAN *v.* Odell, 6 Grat. 207.  
 HARMAN'S ex'x *and* Geiger's adm'r, 3 Grat. 130.  
     devisees *and* Wynn, 5 Grat. 157.  
 HARNSBARGER'S adm'r *v.* Kinney, 6 Grat. 287.  
 HARNSBERGER'S ex'or *v.* Geiger's adm'r, 3 Grat. 144.  
 HARPER & Weston *v.* Baugh & Seguire, 9 Grat. 508.  
 HARRIS' ex'ors *v.* Barnett *et als.*, 3 Grat. 339.  
     adm'r *and* Bentley *et als.*, 2 Grat. 357.\*  
 HARRIS & Hickman's Case, 7 Grat. 600.  
     *et als.* *and* Brewer, 5 Grat. 285.  
 HARRISON Justices *v.* Holland, 3 Grat. 247.  
 HARRISON'S ex'ors *and* Braxton's adm'r, &c., 11 Grat. 30.  
 HARRISON *v.* Harrison's adm'r, 2 Grat. 1.  
     *v.* Middleton, 11 Grat. 527.  
 HARVEY & Co. *and* Niday, 9 Grat. 454.  
 HARVEY'S heirs *and* Anderson, 10 Grat. 386.  
 HASLER'S lessee *v.* King, 9 Grat. 115.  
 HATCHER'S Case, 6 Grat. 667.  
 HATTON'S Case, 3 Grat. 623.  
 HAWKINS' adm'r *and* Perkins' adm'r, 9 Grat. 649.  
 HAWTHORN *and* Reese, 10 Grat. 548.  
 HAYES *v.* Ewell's adm'r *et als.*, 4 Grat. 11.  
     *and* Cook, sheriff, *et als.*, 9 Grat. 142.  
     *v.* Northwestern Bank of Virginia, 9 Grat. 127.  
 HEAD'S Case, 11 Grat. 819.  
 HEALY *et als.* *v.* Rowan *et als.*, 5 Grat. 414.  
 HELMONDOLLER'S Case, 4 Grat. 536.



- HELMS** *and* Alford, 6 Grat. 90.  
     *adm'r and* Holland, 7 Grat. 245.  
     *and others and* Duncan, 8 Grat. 68.  
**HENDERSON** *et als. and* Shepherd, 3 Grat. 367.  
     *v.* Stringer, 6 Grat. 130.  
     *v.* Henderson's ex'x, 9 Grat. 394.  
**HENDERSON'S** Case, 8 Grat. 708.  
**HENDRICK'S** *v.* Shoemaker, 3 Grat. 197.  
     *et als. and* Knifing, 2 Grat. 212.  
**HENKLE'S** ex'x, &c. *v.* Allstadt *et als.*, 4 Grat. 284.  
**HENLEY'S** *adm'r v.* Perkins *et als.*, 6 Grat. 615.  
**HENSON** *and* Creigh's heirs, 10 Grat. 231.  
**HEROLD** *and* McNeil, 11 Grat. 309.  
**HESTEND** *and* Withers, 5 Grat. 456.  
**HETH** *et als. v.* Richm'd, Fred'g & Potomac R. R. Co., 4 Grat. 482.  
**HEWITT**, Ruffner & Co. *and* Bowyer, 2 Grat. 193.  
**HICHAM** *v.* Larkey, 6 Grat. 210.  
**HICKLE** *et als. and* Peale, 9 Grat. 437.  
**HICKS' Case**, 7 Grat. 597.  
**HIGGINS' adm'r and** Burbridge, 6 Grat. 119.  
     *et als. and* Brough, 2 Grat. 408.  
**HIGGINBOTHAM** *v.* Cornwell, 8 Grat. 83.  
**HIGHLAND** *and* Young, 9 Grat. 16.  
**HILL'S Case**, 2 Grat. 594.  
     5 Grat. 682.  
**HILL** *v.* Manser *et als.*, 11 Grat. 522.  
**HILLIS** *v.* Hamiton, *adm'r, et als.*, 10 Grat. 300.  
**HINCHMAN**, &c. *and* Governor for Leightons, 1 Grat. 156.  
**HITT** *and* Humphrey, 6 Grat. 509.  
**HOBBS** *v.* Shumates, 11 Grat. 516.  
**HOBSON** *v.* Yancey *et als.*, 2 Grat. 73.  
**HOCKER** *v.* Hocker *et als.*, 4 Grat. 277.  
**HOGE** *v.* Currin, 3 Grat. 201.  
**HOGUE** *v.* Davis *et als.*, 8 Grat. 4.  
**HOLCOMBE'S** ex'ors *et als. and* Miller, 9 Grat. 665.  
**HOLLAND** *and* Harrison Justices, 3 Grat. 247.  
     *v.* Helm's *adm'r*, 7 Grat. 245.  
**HOLT** *and* Moore *et als.*, 10 Grat. 284.  
**HOMAN'S** Committee *and* Beery, 8 Grat. 48.  
**HOOMES' adm'r et als. and** Dickinson, 8 Grat. 353.  
     *and* Dickinson, 1 Grat. 302.  
**HOPE** *v.* Smith, sheriff, 10 Grat. 221.  
**HOPKINS**, &c. *v.* Koonce, 6 Grat. 387.  
     Bro. & Co. *v.* Richardson, 9 Grat. 485.  
     *adm'r v.* Cockerell *et als.*, 2 Grat. 88.  
**HOPPER**, Stiers & Lemmon's Case, 6 Grat. 684.  
**HORD** *et als. and* Hume, 5 Grat. 374.  
**HORSLEY** *et als. v.* Garth *et als.*, 2 Grat. 471.  
**HOWARD** *and* the Commonwealth, 1 Grat. 555.  
**HOWEL'S Case**, 5 Grat. 664.  
**HOWEL**, &c. *v.* Cowles, 6 Grat. 393.  
**HOYE** *et als. and* Chesapeake & Ohio C. Co., 2 Grat. 511.  
**HUDGIN** *v.* Hudgins' ex'or *et als.*, 6 Grat. 320.  
**HUDSON** *v.* Kline, 9 Grat. 379.  
**HUGHART** *et al. and* Bowyer, 9 Grat. 336.  
**HUME** *v.* Hord *et als.*, 5 Grat. 374.  
**HUMPHREY** *v.* Hitt, 6 Grat. 509.

- HUMPHREY *and* Noyes' ex'x, 11 Grat. 636.  
 HUNDLEY *and* Armstead, 7 Grat. 52.  
 HUNTER *v.* Waite, 3 Grat. 26.  
     *v.* Lawrence's adm'r et al., 11 Grat. 111.  
 HUNTER'S Case, 7 Grat. 641.  
 HUNT'S adm'r *v.* Martin's adm'r, 8 Grat. 578.  
 HUPP *v.* Hupp, 6 Grat. 310.  
     *and* Bank of Washington, 10 Grat. 23.  
 HURT *and* Watson, 6 Grat. 633.  
 HUSTON'S ex'ors *and* Pence for &c., 6 Grat. 304.  
 HUTCHISON et als. *and* Stephens, 6 Grat. 147. •  
     *and* wife *v.* Rust et als., 2 Grat. 394.  
 HUTCHERSON, &c. *v.* Pigg, 8 Grat. 220.  
 HYLTON *v.* Hylton, 1 Grat. 161.
- IRICK *and* wife *v.* Fulton's ex'ors, 3 Grat. 193.  
 ISBELL'S adm'r *v.* Norvell's ex'or, 4 Grat. 176.  
 ISLER *and* wife *v.* Grove *and* wife, 8 Grat. 257.
- JAQUES' Case, 10 Grat. 690.  
 JACKSON *and* M'Cluny & Co., 6 Grat. 96.  
 JACKSON'S adm'r *v.* Jackson's heirs, 1 Grat. 143.  
 JAMESON'S adm'x *v.* Deshields, 3 Grat. 4.  
 JAMES River *and* Kanawha Co. *v.* Thomson & Teays, 3 Grat. 270.  
     *and* Bailey, 11 Grat. 468.  
 JANNEY et als. *and* McLaughlin, 6 Grat. 609.  
 JARRET'T *v.* Johnson, 11 Grat. 327.  
 JAYNES et als. *v.* Brock et als., 10 Grat. 211.  
 JEFFRESS et als. *and* Miller *and* wife, 4 Grat. 472.  
 JENNINGS' Case, 3 Grat. 624.  
 JENNINGS *v.* Palmer, 8 Grat. 70.  
     et als. *v.* Montagne, 2 Grat. 350.  
 JENNINGS' adm'r *and* Johnson's ex'x, 10 Grat. 1.  
 JESSE *v.* Preston, 5 Grat. 120.  
     et als. *v.* Parker's adm'rs et als., 6 Grat. 57.  
 JETER *v.* Langhorne, 5 Grat. 193.  
 JINCEY et als. *and* Jones, 9 Grat. 708.  
     *v.* Wingfield's adm'r, 9 Grat. 708.  
 JOHNS et als. *and* Middleton, 4 Grat. 129.  
 JOHNSTON'S Case, 5 Grat. 660.  
 JOHNSON'S Case, 2 Grat. 581.  
 JOHNSON *v.* Dunn, 6 Grat. 625.  
     *and* Jarrett, 11 Grat. 327.  
 JOHNSON'S ex'or et als. *and* Ball et als., 8 Grat. 281.  
     ex'x *v.* Jennings' adm'r, 10 Grat. 1.  
 JOHNSTON *and* Young for, &c., 10 Grat. 269.  
     *and* wife *v.* Slater et al., 11 Grat. 321.  
     *v.* Zane's trustees et als., 11 Grat. 552.  
 JONES' Case, 2 Grat. 555.  
 JONES, &c. *v.* Myrick's ex'ors, 8 Grat. 179.  
     *and* Nuckol's adm'r, 8 Grat. 267.  
     *v.* Jincey et als., 9 Grat. 708.  
     *and* Kennaird, &c., 9 Grat. 183.  
     *v.* Lackland et als., 2 Grat. 81.  
     et als. *and* Miller, 9 Grat. 584.  
     *and* wife *v.* Obenchain et als., 10 Grat. 259.  
 JORDAN *v.* Wyatt, 4 Grat. 151.

# LIST OF CASES, ETC.

- KEAN** *v.* Welsh, 1 Grat. 403.  
**KEE'S** ex'or *v.* Kee's creditors, 2 Grat. 116.  
**KEITH** *v.* Preston, 5 Grat. 120.  
**KELSO'S** adm'r et als. *and* Ben Mercer et als., 3 Grat. 106.  
**KELLY** *v.* Paul, 3 Grat. 191.  
     *v.* Scott, 5 Grat. 479.  
     *v.* Linkenhoger, 8 Grat. 104.  
**KELLY'S** Case, 8 Grat. 632.  
**KEMP** et als. *and* Callis et als., 11 Grat. 78.  
**KENNAIRD**, &c. *v.* Jones, 9 Grat. 183.  
**KENNEDY** *and* Dabney and wife et als., 7 Grat. 317.  
**KENT** et als. *and* Tiffaney, 2 Grat. 231.  
**KERN'S** et als. *and* Sharp, 2 Grat. 348.  
**KESLER** *and* Booth, 6 Grat. 350.  
**KEVAN** *v.* Branch, 1 Grat. 274.  
**KIDWELL** *v.* Baltimore & Ohio Railroad Co., 11 Grat. 676.  
**KINCHELOE** *v.* Tracewells, 11 Grat. 587.  
**KING** et als. *and* Ott's ex'x, 8 Grat. 224.  
     *and* Hasler's lessee, 9 Grat. 115.  
     *and* Roberts, 10 Grat. 184.  
**KINNAIRD** *and* McClellan, 6 Grat. 352.  
**KINNEY** *and* Harnsbarger's adm'r, 6 Grat. 287.  
**KINSEY** *and* Booth, 8 Grat. 560.  
**KIRBY**, adm'r, &c. et als. *and* Martin, adm'r, 11 Grat. 67.  
**KLINE** *and* Hudson, 9 Grat. 379.  
**KNAPP**, Preston & Co. *and* Dabneys, 2 Grat. 354.  
**KNIFONG** *v.* Hendricks et als., 2 Grat. 212.  
**KNISELEY** *v.* Williams et als., 3 Grat. 265.  
**KOINER** *v.* Rankin's heirs, 11 Grat. 420.  
**KOONCE** *and* Hopkins, &c., 6 Grat. 387.  
**KRETZER** *v.* Wyson, 5 Grat. 9.  
**KYLE** *and* Price, 9 Grat. 247.  
**KYLES** *v.* Tait's adm'r 6 Grat. 44.  
     ex'or *v.* Kyle 1 Grat. 526.  
  
**LACKLAND** et als. *and* Jones 2 Grat. 81.  
**LAFFERTY'S** Case, 6 Grat. 672.  
**LAMB** *and* Wise, 9 Grat. 294.  
**LAMBERTS** *and* Smith's adm'r, 7 Grat. 138.  
**LANCASTER** *and* Shanks et als, 5 Grat. 110.  
..... **LANGHORNE** *and* Jeter, 5 Grat. 193.  
**LANTHROP'S** Case, 6 Grat. 671.  
**LARKEY** *and* Hickam, 6 Grat. 210.  
**LAW** *v.* Law, 2 Grat. 366.  
**LAWS'** ex'ors *v.* Sutherland et als., 5 Grat. 357.  
**LAWRENCE'S** adm'r et al. *and* Hunter, 11 Grat. 111.  
**LAZIER'S** Case, 10 Grat. 708.  
**LAZIER** et als. *and* Wilson, 11 Grat. 477.  
**LEAKE** *v.* Ferguson, 2 Grat. 419.  
**LEA'S** ex'or *v.* Eidson, 9 Grat. 277.  
**LEE'S** ex'or *v.* Boak, 11 Grat. 182.  
**LEMON**, gurdian, *v.* Harnsbarger, 6 Grat. 301.  
**LENOWS** *v.* Lenow, 8 Grat. 349.  
**LEWIS** *v.* Washington, 5 Grat. 265.  
     et als. *v.* Caperton's ex'or et als, 8 Grat. 148.  
**LEVASSER** *v.* Washburn, 11 Grat. 572.  
**LEVISAY** et als. *and* Steele, 11 Grat. 454.

- LEVY *v.* Arnsthall, 10 Grat. 641.  
 LIGGATT *v.* Withers, 5 Grat. 24.  
 LINKENHOGGER *and* Kelly, 8 Grat. 104.  
 LIPSCOMB *and* United States, 4 Grat. 41.  
 LITERARY Fund *v.* Dalby, 4 Grat. 528.  
 LITTON'S Case, 6 Grat. 691.  
 LIVELY *and* Pollard's heirs, 2 Grat. 216, 4 Grat. 73.  
 LIVINGSTON'S Case, 7 Grat. 658.  
 LODGE'S Case, 2 Grat. 579, 6 Grat. 699.  
 LOFTUS' Case, 3 Grat. 631.  
 LOGAN'S Case, 2 Grat. 571, 5 Grat. 692.  
 LOGAN *and* Neal 1 Grat. 14.  
 LOUISA Railroad Co. *and* Trevillian, 3 Grat. 326.  
 LOWE *v.* Miller, 3 Grat. 205.  
 LUCAS *and* wife *v.* Duffield, 6 Grat. 456.  
 LUCY *v.* Cheminant's adm'r, 2 Grat. 36.  
 LUMPKIN *and* Washington, 5 Grat. 432.  
     *and* Pollard, 6 Grat. 398.  
 LUSTER *v.* Middlecoff et als, 8 Grat. 54.  
 LYLE *v.* Overseers of the Poor of Ohio County, 8 Grat. 20.  
 LYNCH et als *and* Yerby and Wife, 3 Grat. 460.  
 LYONS *v.* Miller, 6 Grat. 427.  
 LYONS' adm'r *v.* Magagno's adm'r, 7 Grat. 377.  
 LYONS *and* McGruder, 7 Grat. 232.  
     *and* Drake, 9 Grat. 54.  
  
 MACAULAY'S adm'r *v.* Griffin's ex'or et als, 4 Grat. 9.  
     ex'or *and* Griffin's ex'or et als, 7 Grat. 476.  
     adm'r *and* Griffin's ex'or et als, 7 Grat. 476.  
     adm'r et als. *and* Dismal Land Swamp Co., 7 Grat. 746.  
 MACHIR *v.* Moore, 2 Grat. 257.  
 MACHIR'S adm'r *and* Mulliday, 4 Grat. 1.  
 MACON *and* McKenzie et als, 5 Grat. 379.  
 MADDOX et al. *v.* Maddox's adm'r et als, 11 Grat. 804.  
 MAGAGNO'S adm'r *and* Lyons' adm'r, 7 Grat. 377.  
 MAIRS *v.* Gallahue, 9 Grat. 94.  
 MANN *v.* Gwynn et als, 8 Grat. 58.  
 MANSER et al. *and* Hill, 11 Grat. 522.  
 MARKLE'S adm'r et als. *v.* Burch's adm'r, 11 Grat. 26.  
 MARSHALL'S Case, 5 Grat. 663.  
     5 Grat. 693.  
 MARSTELLER *v.* Weaver, 1 Grat. 391.  
 MARTIN *and* Adams, 8 Grat. 107.  
     adm'r *and* Hunts adm'r, 8 Grat. 578.  
     *v.* Hall et als, 9 Grat. 8.  
     adm'r *v.* Kirby's adm'r et als, 11 Grat. 67.  
 MARTINEY'S ex'or *and* Phillips et als, 10 Grat. 333.  
 MASON'S adm'r *v.* Dunn's adm'r, 5 Grat. 384.  
     adm'r et als, *and* Almond and Wife, 9 Grat. 700.  
 MASTER'S *v.* Varner's ex'ors, 5 Grat. 168.  
 MATTHEWS et als. *v.* Cabaness, 2 Grat. 325.  
 MAY'S *v.* Swope, 8 Grat. 46.  
 McALPINE'S heirs *and* Otley, 2 Grat. 340.  
 McCALL *and* Prestons, 7 Grat. 121.  
 McCANCE *v.* Taylor 10 Grat. 580.  
 McCANDLISH, adm'r, &c., *v.* Edloe et als, 3 Grat. 330.  
 McCARTY *v.* Gibson, 5 Grat. 307. 4

- McCLANACHAN et als. *and* Siter, Price & Co., 2 Grat. 280.  
 McCLEARY et al. *and* Purcell, 10 Grat. 246.  
 McCLELLAND v. Kennaird, 6 Grat. 352.  
 McCCLUNY & Co. v. Jackson, 6 Grat. 96.  
 McCCLUNG et als. *and* Young, adm'r and Bowyer, 9 Grat. 336.  
 McClUER *and* Goodwin, 3 Grat. 291.  
 McCCLURE *and* Clarke, 10 Grat. 305.  
     *v.* THISTLE'S ex'ors, 2 Grat. 182.  
 McCORKLE & Adams *and* Caperton, 5 Grat. 177.  
 McCORMICK v. Blackford & Son, 4 Grat. 133.  
 McCORTNEY et als. *and* Caldwell's ex'ors, 2 Grat. 187.  
 McCOY et als. *and* Parker et als, 10 Grat. 594.  
 McCUE v. Ralston, 9 Grat. 430.  
 McCULLOCH et als. *and* Governor for Bryan, 2 Grat. 175.  
 McDONALD et als. *and* Burr's ex'or et als, 3 Grat. 215.  
 McDOWELL *and* Carper et als, 5 Grat. 212.  
 McDOWELL'S ex'or v. Crawford, 11 Grat. 377.  
 McGINNIS *and* Seamonds, 3 Grat. 319.  
 McGRUDER v. Lyons, 7 Grat. 233.  
 McGUIRE et als v. Pierce, assignee, &c., 9 Grat. 167.  
 McKEE v. Bailey, 11 Grat. 340.  
 McKENZIE et als. v. Macon, 5 Grat. 379.  
 McKINLEY *and* Parrill, 9 Grat. 1.  
     sheriff, &c., for Berry v. Ensell et als, 2 Grat. 333.  
 McKINNEY'S Case, 8 Grat. 589.  
 McLAUGHLAN'S adm'r et als. *and* Ross' ex'or, 7 Grat. 86.  
 McLAUGHLIN v. Duffield, 5 Grat. 133.  
     *v.* Janney et als, 6 Grat. 609.  
     *and* Peatross, 6 Grat. 64.  
     *v.* Bank of Potomac et als, 7 Grat. 68.  
 McLAUGHLIN'S adm'r *and* Vance, 8 Grat. 289.  
 McLUER'S adm'r et als *and* Rogers, 4 Grat. 81.  
 McMASTER v. McMaster's ex'ors, 10 Grat. 275.  
 McNEALE et als. v. Governor for Clarke, 3 Grat. 299.  
 McNEEL v. Herold, 11 Grat. 309.  
 McNEW v. Smith, 5 Grat. 84.  
 McPHERSON v. Nesmith and wife 8 Grat. 237.  
 McREYNOLD'S v. Counts et als, 9 Grat. 242.  
 McWHIRT'S Case, 3 Grat. 594.  
 MECHAN *and* Bourne's ex'or, 1 Grat. 292.  
 MEDLEY *and* Hariston, 1 Grat. 96.  
 MEEK'S adm'r, &c. v. Thompson et als, 8 Grat. 134.  
 MEEM et als. *and* Cralle et als, 8 Grat. 496.  
     *and* Rucker, 10 Grat. 506.  
 MENEFREE *and* Colvin, 11 Grat. 87.  
 MERCER, Ben, et als. v. Kelso, adm'r et als, 4 Grat. 106.  
 MEREDITH, Judge, *and* Barnett, 10 Grat. 650.  
 MERTENS v. Nottebohm, 3 Grat. 163.  
 MICHAEL *and* Hampton, Smith & Co., 6 Grat. 151.  
 MICHIE *and* Wright, 6 Grat. 354.  
 MICHAUX'S adm'r v. Brown et als, 10 Grat. 612.  
 MIDDLECOFF et als. *and* Luster, 8 Grat. 54.  
 MIDDLETON v. Johns, et als, 4 Grat. 129.  
     *and* Harrison, 11 Grat. 527.  
     *v.* Pinnell, 2 Grat. 202.  
 MILLER *and* Lowe, 3 Grat. 205.  
     &c. *and* Wadsworth, &c., 4 Grat. 99.

- MILLER and wife *and* Jeffress et als, 4 Grat. 472.  
     &c. *and* Haffey, &c., 6 Grat. 454.  
     *and* Lyons, 6 Grat. 427.
- MILLER'S ex'ors *and* Curd, 7 Grat. 185.
- MILLER *v.* Holcombe's ex'ors et als, 9 Grat. 665.  
     *v.* Jones et als, 9 Grat. 584.
- MILLERS *v.* Catlett, 10 Grat. 477.
- MILLER et als, *and* Cales, 8 Grat. 6.
- MINOR *v.* Minor's adm'r, 8 Grat. 1.
- MITCHELL'S adm'r *v.* Trotter and wife, 7 Grat. 136.
- MOFFATT *v.* Bowman, 6 Grat. 219.
- MONROE *and* Vance, 4 Grat. 52.
- MONTAGUE *and* Jennings et als, 2 Grat. 350.
- MONTAGUE'S Case, 10 Grat. 767.  
     ex'x *v.* Turpin's adm'x et als, 8 Grat. 453.
- MOORES *v.* White, et als, 3 Grat. 139.
- MOORE *v.* Thornton et als, 7 Grat. 99.  
     *v.* Moore's, ex'or, et als, 8 Grat. 307.  
     et als. *v.* Holt, 10 Grat. 284.
- MOORE'S adm'r *and* The Commonwealth, 1 Grat. 294.
- MORGAN'S Case, 7 Grat. 592.  
     adm'r et als. *and* Allen and Ervine, 8 Grat. 60.
- MORRIS, adm'r *v.* Morris' adm'r et als, 4 Grat. 293.  
     *and* Crawford, 5 Grat. 90.  
     *v.* Peregoy, 7 Grat. 373.  
     *v.* Morris, 9 Grat. 637.  
     Ex parte, 11 Grat. 292.
- MORRISETT'S Case, 6 Grat. 673.
- MORRISON'S ex'ors *and* Peay, 10 Grat. 149.
- MORRISON *v.* Speer, 10 Grat. 228.  
     *and* Downer & Co., 2 Grat. 237, 250.
- MOSBY'S adm'r et als. *v.* Mosby's adm'r, 9 Grat. 584.
- MOSELEY *v.* Moss, 6 Grat. 534.
- MOSS *and* Moseley, 6 Grat. 534.
- MULLIDAY *v.* Machir's adm'r, 4 Grat. 1.
- MULL'S Case, 8 Grat. 695.
- MUIR *v.* Falconer, 10 Grat. 12.
- MUNDAY *v.* Vawter et als. 3 Grat. 518.
- MURRAY, Caldwell & Co. *v.* Pennington, 3 Grat. 91.  
     et als. *and* Chinn et als, 4 Grat. 348.
- MYERS & Co. *and* Dixon, 7 Grat. 240.
- MYRICK'S ex'ors *and* Jones, &c., 8 Grat. 179.  
     *v.* Epes et als, 8 Grat. 179.
- NASH *v.* Upper Appomattox Co., 5 Grat. 332.
- NEAL *and* Gardner, 9 Grat. 85.  
     *v.* Logan, 1 Grat. 14.
- NEMO'S Case, 2 Grat. 558.
- NELSON *and* The Northwestern Bank, 1 Grat. 108.
- NELSON'S adm'r *v.* Armstrong et als, 5 Grat. 354.  
     ex'or *v.* Page et als, 7 Grat. 160.  
     adm'r *v.* Cornwell, 11 Grat. 724.
- NESMITH and wife *and* McPherson, 3 Grat. 237.
- NEWBROUGH *v.* Walker, 8 Grat. 16.
- NEWBY *v.* Forsyth, 3 Grat. 308.
- NEWTON et als. *and* Alexander & Co., 2 Grat. 266.
- NICHOLS & Snyder *and* Ford, 3 Grat. 88.

- NICKOLS *and* Shumaker 6 Grat. 592.  
     *& Jones' Case* 7 Grat. 589.  
     *v. Campbell*, 10 Grat. 560.
- NICKELL *& Miller v. Handley et als*, 10 Grat. 336.
- NIDAY *v. Harvey & Co. et als*, 9 Grat. 454.
- NOCK *v. Nock's ex'ors*, 10 Grat. 106.
- NORMAN'S ex'x *v. Cunningham and wife et als*, 5 Grat. 63.
- NORTHWESTERN Bank of Va. *and Hays*, 9 Grat. 127.  
     *v. Nelson*, 1 Grat. 108.
- NOTTEBOHMS *and Mertons*, 4 Grat. 163.
- NOWELL'S ex'or *and Isbell's adm'r*, 4 Grat. 176.
- NOWLIN *and wife v. Winfree*, 8 Grat. 346.
- NOWLIN'S adm'r *et als, v. Scott*, 10 Grat. 64.
- NOYES' ex'x *v. Humphreys*, 11 Grat. 636.
- NUCKOLS' adm'r *v. Jones*, 8 Grat. 267.
- NUTTER'S Case, 8 Grat. 699.
- OBENCHAIN *et als. and Jones, and Wife*, 10 Grat. 259.
- O'BRIEN *et als. v. Stephens et als*, 11 Grat. 610.
- ODELL *and Harman*, 6 Grat. 207.
- OLIVER'S ex'or *v. Hallam's adm'r*, 1 Grat. 298.
- ORANGE Humane Society *and Shiflet, &c.*, 7 Grat. 297.
- ORICK *v. Colston*, 7 Grat. 189.
- OTIS *et als. and Carrington et als*, 4 Grat. 235.
- OTLEY *v. McAlpine's heirs*, 2 Grat. 340.
- OTT'S ex'x *v. King et als*, 8 Grat. 224.
- OVERBY *and Boyle's adm'r*, 11 Grat. 202.
- OVESEERS of the Poor of Ohio County *and Lyle*, 8 Grat. 20.  
     of the Poor of Wood County *and Willard*, 9 Grat. 139.  
     of the Poor *v. Bank of Virginia et als*, 2 Grat. 544.
- OVERSTREET *et als. and Gray*, 7 Grat. 346.
- OVERTON'S heirs *v. Davisson*, 1 Grat. 211.
- PAGE *et als. and Nelson's ex'or*, 7 Grat. 160.
- PALMER *and Calhoun*, 8 Grat. 88.  
     *and Jennings*, 8 Grat. 70.  
     *et als. and Beckley*, 11 Grat. 625.
- PANNILL, &c. *and Barber & Co.*, 6 Grat. 442.
- PARIS *et als. and Cochran*, 11 Grat. 348.
- PARKER'S adm'r's *et als. and Jesse et als.*, 6 Grat. 57.  
     *ex'ors v. Brown's ex'ors et als.*, 6 Grat. 554.
- PARKER *and Wife v. Wasley's ex'or et als.*, 9 Grat. 477.  
     *et als. v. McCoy et als.*, 10 Grat. 594.  
     *v. Cousins*, 2 Grat. 372.
- PARRAMORE *v. Taylor*, 11 Grat. 220.
- PARRILL *v. McKinley*, 9 Grat. 1.
- PASLEYS *v. English et als.*, 5 Grat. 141.
- PASLEY *v. English*, 10 Grat. 236.
- PATES *v. St. Clair*, 11 Grat. 22.
- PATTERSON *and Crawford's ex'or*, 11 Grat. 364.
- PATTESON *v. Ford*, 2 Grat. 18.
- PATTON'S ex'ors *v. Calhoun's ex'ors*, 4 Grat. 138.
- PAUL *and Kelley*, 3 Grat. 191.
- PEALE *v. Hickle and others*, 9 Grat. 437.
- PEARCE'S Case, 6 Grat. 669.
- PEAS' Case, 2 Grat. 629.
- PEATROSS *v. McLaughlin*, 6 Grat. 64.

- PEAY *v.* Morrison's ex'ors, 10 Grat. 149.  
 PEERS' Case, 5 Grat. 674.  
 PENCE *for, &c. v.* Huston's ex'ors, 6 Grat. 304.  
 PENDLETON *et als. and* Asher, 6 Grat. 628.  
 PENNINGTON *and* Murray, Caldwell & Co., 3 Grat. 91.  
 PEREGOY *and* Morriss, 7 Grat. 373.  
 PERKINS' Case, 7 Grat. 373.  
     *v.* Perkins' ex'or, 3 Grat. 364.  
     Trustee *v.* Dickinson & Co., 3 Grat. 335.  
     *and* Woodson, trustee, 5 Grat. 345.  
     *et als. and* Henley's adm'r, 6 Grat. 615.  
     adm'r *v.* Hawkins' adm'r, 9 Grat. 649.  
 PERRY'S Case, 3 Grat. 622.  
 PETER *et als. v.* Hargrave *et als.*, 5 Grat. 12.  
 PEYTON *et als. v.* Stratton *et als.*, 7 Grat. 380.  
 PEYUON'S ex'or *and* Cookus, 1 Grat. 431.  
     *and* Commonwealth, 2 Grat. 393.  
 PHAUP, &c. *v.* Stratton, 9 Grat. 615.  
 PHILIPS *et als. v.* Williams, &c., 5 Grat. 259.  
     *et als. v.* Martincy's ex'or, 10 Grat. 333.  
 PHIPPEN *v.* Durham *et als.*, 8 Grat. 457.  
 PHOEBE *v.* Boggess, 1 Grat. 129.  
 PICKERING'S Case, 8 Grat. 628.  
 PIERCE, assignee, *and* McGuire *et als.*, 9 Grat. 167.  
 PIGG *and* Hutcherson, &c., 8 Grat. 220.  
 PINCHARD *v.* Woods, &c., 8 Grat. 140.  
 PINNELL *and* Middleton, 2 Grat. 202.  
 PIPER *v.* Douglas' ex'or, 3 Grat. 371.  
 PITMAN *v.* Breckenridge & Crawford, 3 Grat. 127.  
 PITTMAN, sheriff, *v.* R. Staton, 11 Grat. 99.  
     *and* B. Staton, 11 Grat. 99.  
 PLUMER'S Case, 3 Grat. 645.  
 POINDEXTER, &c. *v.* Davis *et als.* 6 Grat. 481.  
 POINDEXTER'S adm'r *v.* Prince George Justices, 11 Grat. 190.  
 POLLARD'S heirs *v.* Lively, 2 Grat. 216; 4 Grat. 73.  
 POLLARD *and* Trimyer, 5 Grat. 460.  
     *and* Washington, 5 Grat. 432.  
     *v.* Lumpkin, 6 Grat. 398.  
 POLLOCK *and* wife *v.* Glassell, 2 Grat. 439.  
 POTTERFIELD *v.* Coiner, 4 Grat. 55.  
 POWELL'S Case, 11 Grat. 822.  
 POWELL *v.* Stratton *et als.*, 11 Grat. 792.  
 PRENTICE & Weissinger *v.* Zane, 2 Grat. 262.  
 PRESIDENT *and* Directors of Bank of Va. *v.* Robinson, 5 Grat. 174.  
     *and* Directors Northwestern Turnpike Road *and* Dunnington, 6 Grat. 160.  
 PRESTON'S heirs *and* Robinett, 4 Grat. 142.  
 PRESTON, T. L., *v.* J. Preston *et als.*, 4 Grat. 88.  
     *and* Jesse, 5 Grat. 120.  
     *and* Keith, 5 Grat. 120.  
 PRESTON'S *v.* McCall, 5 Grat. 120.  
 PRICE *v.* Browning, 4 Grat. 68.  
     *v.* Via's heirs, 8 Grat. 79.  
     *v.* Kyle, 9 Grat. 247.  
 PRICE'S heirs *v.* Price's adm'r, 9 Grat. 45.  
     ex'ors *v.* Ayres, 10 Grat. 575.  
 PRINCE George Justices *and* Poindexter's adm'r, 11 Grat. 190.



- PRINCE George Justices *and* Richardson's adm'r, 11 Grat. 190.  
 PRYOR *v.* Duncan et als., 6 Grat. 27.  
 PUCKETT *and* Whitworth and wife, 2 Grat. 528.  
 PUGH *and* Souter et als., 9 Grat. 260.  
 PURCELL and wife *v.* Wilson, 4 Grat. 16.  
     *v.* McCleary et al., 10 Grat. 246.  
     *and* Cheshire, 11 Grat. 771.  
  
 RAGLAND'S adm'r *and* Glazebrook's adm'r, 8 Grat. 332.  
 RAGSDALE *v.* Hagy and others, 9 Grat. 409.  
 RAINE et als. *v.* Bank of Virginia, 4 Grat. 150.  
 RALSTON *and* McCue, 9 Grat. 430.  
 RAND *v.* Reynolds, 2 Grat. 171.  
 RAND'S Case, 9 Grat. 738.  
 RANKIN *v.* Roler et als., 8 Grat. 63.  
 RANKIN'S heirs *and* Koiner, 11 Grat. 420.  
     ex'or *v.* Rankin's adm'r, 1 Grat. 153.  
 RATCLIFF'S Case, 5 Grat. 657.  
 READ & Co. *and* Stainback, 11 Grat. 281.  
 REDD'S adm'r et als. *and* Crump et als., 6 Grat. 372.  
 REED *v.* Cline's heirs, 9 Grat. 136.  
 REESE *v.* Hawthorn, 10 Grat. 548.  
 REEVES *v.* Dickey, 10 Grat. 138.  
 REID and wife *and* Ross' adm'r, 8 Grat. 229.  
 REID'S adm'r *v.* Strider's adm'r, 7 Grat. 76.  
     *and* Strider, 2 Grat. 38.  
 REIGLE *and* Farish & Co., 11 Grat. 697.  
 REYNOLDS *and* Griffith et als., 4 Grat. 46.  
     *and* Rand, 2 Grat. 171.  
     *v.* Bank of Virginia et als., 4 Grat. 174.  
 RHEA *v.* Gibson's ex'or, 10 Grat. 215.  
 RIDDICK'S ex'ors *and* Flemings, 5 Grat. 272.  
 RICE'S ex'or *v.* Annatt's adm'r, 8 Grat. 557.  
 RICE et als. *and* Fones, 9 Grat. 568.  
 RICHARDS *and* Brent, 2 Grat. 539.  
 RICHARDSON *and* Austin, 1 Grat. 310.  
     *and* Hopkins, Bro. & Co., 9 Grat. 485.  
 RICHARDSON'S adm'r *v.* Prince George Justices, 11 Grat. 190.  
 RICHESON *v.* Richeson et als., 1 Grat. 497.  
 RICHMOND *and* Petersburg Railroad Co. *and* Hancock, 3 Grat. 328.  
     Fred'g and Potomac R. R. Co. *and* Heth et als., 4 Grat. 482.  
 RICKS *and* the Commonwealth, 1 Grat. 416.  
 RIVANNA Nav. Co. *v.* Dawsons, 3 Grat. 19.  
 ROACH *v.* Dickinsons, 9 Grat. 154.  
     et als. *and* Governor for Davis, 9 Grat. 13.  
     *v.* Gardner, 9 Grat. 89.  
     *and* the Commonwealth, 1 Grat. 561.  
 ROADCAP and wife *v.* Sipe, 6 Grat. 213.  
 ROANE *and* Aylett, 1 Grat. 282.  
 ROBERTS *v.* Colvin, 3 Grat. 358.  
     *v.* King, 10 Grat. 184.  
 ROBERTSON *and* Sharpe, 5 Grat. 518.  
 ROBIN *and* Binford's adm'r, 1 Grat. 327.  
 ROBINETT *v.* Preston's heirs, 4 Grat. 142.  
 ROBINSON *and* Bank of Virginia, 5 Grat. 174.  
     *v.* Allen and others, 11 Grat. 785.  
     et als. *v.* Sherman et als., 2 Grat. 178.

- ROBINSON *and* Bailey's adm'r, 1 Grat. 4.  
 ROBINSON'S ex'ors *v.* Day, 5 Grat. 55.  
 ROGERS *v.* McLuer's adm'r et als., 4 Grat. 81.  
     *v.* Denham's heirs, 2 Grat. 200.  
 ROLER et als. *and* Rankin, 8 Grat. 63.  
 ROMINE *and* Cox, &c., 9 Grat. 27.  
 ROOTES' ex'x *v.* Tomkins' trustees, 3 Grat. 98.  
 ROSSER, ex'or of Wood, *v.* Depriest et als., 5 Grat. 6.  
     &c. *v.* Franklin, 6 Grat. 1.  
 ROSSETT *v.* Fisher et al., 11 Grat. 492.  
 ROSS' ex'or *v.* Haden's adm'r, 7 Grat. 86.  
     *v.* McLauchlan's adm'r et als., 7 Grat. 86.  
     adm'r *v.* Reid and wife, 8 Grat. 229.  
 ROSS *and* Devers, 10 Grat. 252.  
 ROWAN et als. *and* Healy et als., 5 Grat. 414.  
 ROWANS *v.* Givens, 10 Grat. 250.  
 RUCKER *and* Meem, 10 Grat. 506.  
 RUFF *v.* Starke's adm'r, 3 Grat. 134.  
 RUST'S adm'r *and* Slagle, 4 Grat. 274.  
 RUST et als. *v.* Ware, 6 Grat. 50.  
     *and* Whiting, 1 Grat. 483.  
     et als. *and* Hutcheson and wife, 2 Grat. 394.  
  
 SALYARDS et als. *and* Bryan, 3 Grat. 188.  
 SAMPSON *v.* Goochland Justices, 5 Grat. 241.  
 SAUNDERS' adm'r *v.* Commonwealth, 3 Grat. 214.  
 SAUNDERS *v.* Commonwealth, 10 Grat. 494.  
 SCARBURGH et als. *and* Wallops' adm'r, 5 Grat. 1.  
 SCHOFIELD *v.* Cox et als., 8 Grat. 533.  
 SCHULTZ *v.* Schultz et als., 10 Grat. 358.  
 SCOTT'S Case, 5 Grat. 697.  
     Case, 10 Grat. 749.  
 SCOTT et als. *and* Beverley, 4 Grat. 187.  
     *and* Kelly, 5 Grat. 479.  
     *and* Nowlin's adm'r et als., 10 Grat. 64.  
 SEAMAN et als. *and* Dance et als., 11 Grat. 778.  
 SEAMONDS *v.* McGinniss, 3 Grat. 319.  
 SEARS et als. *and* Billups, 5 Grat. 31.  
 SEBRELL *and* Craig, 9 Grat. 131.  
 SENTER et al. *v.* Pugh, 9 Grat. 260.  
 SERPELL *and* Wild's lessee, 10 Grat. 405.  
 SEXTON *v.* Sexton, 9 Grat. 204.  
 SHACKLEFORD *v.* Apperson, 6 Grat. 451.  
 SHANKS et als. *v.* Lancaster, 5 Grat. 110.  
 SHARP *v.* Kerns et als., 2 Grat. 348.  
 SHARPE *v.* Robertson, 5 Grat. 518.  
 SHELDON et als. *v.* Armistead's adm'r et als., 7 Grat. 264.  
 SHELTON *and* others' Case, 8 Grat. 592.  
 SHEPHERD, Hunter & Co. *v.* Frys, 3 Grat. 442.  
     *v.* Henderson et als., 3 Grat. 367.  
 SHEPPARD *v.* Stubbs, 3 Grat. 373.  
 SHEPPARDS *v.* Turpin, 3 Grat. 373.  
 SHEPPERSON *v.* Shepperson et als., 2 Grat. 501.  
 SHERMAN et als. *and* Robinson et als., 2 Grat. 178.  
 SHIFFLETT, &c. *v.* Orange Humane Society, 7 Grat. 297.  
 SHOEMAKER *and* Hendricks, 3 Grat. 197.  
 SHUMAKER *v.* Nichols, 6 Grat. 592.

- SHUMATES *and* Hobbs, 11 Grat. 516.  
 SILLINGS *et als.* *v.* Bumgardner, guardian, 9 Grat. 273.  
 SIMMONS *and* Bean *et al.*, 9 Grat. 389.  
 SIPE *and* Roadcap *and* wife, 6 Grat. 213.  
 SITER, Price & Co. *v.* McClanachan *et als.*, 2 Grat. 280.  
 SKINKER *and* Weaver, 4 Grat. 160.  
 SLACK *v.* Wood, 9 Grat. 40.  
 SLAGLE *v.* Rust's adm'r, 4 Grat. 274.  
 SLATER *et als.* *and* Johnston *and* wife, 11 Grat. 321.  
 SLAUGHTER'S adm'r *and* Tutt, 5 Grat. 364.  
     *v.* Commonwealth, 2 Grat. 391.  
 SMITH *v.* Davis, 4 Grat. 50.  
     *and* Boyce's adm'r, 9 Grat. 704.  
     *et als.* *v.* Chapman, 10 Grat. 445.  
     & Burwell *and* the Commonwealth, 1 Grat. 553.  
     *et al.* *and* Cunningham, 10 Grat. 255.  
     Sheriff, *and* Hope, 10 Grat. 221.  
     & Carter *and* Dickinson, 5 Grat. 135.  
     *and* McNew, 5 Grat. 84.  
     *et als.* *v.* Flint *et als.*, 6 Grat. 40.  
     *et als.* *v.* Thompson's adm'r *et als.*, 7 Grat. 112.  
     *and* Tayloe, 10 Grat. 557.  
 SMITH'S Case, 10 Grat. 734.  
     Case, 4 Grat. 532.  
     Case, 6 Grat. 696.  
     Case, 7 Grat. 593.  
     ex'or *v.* Spiller, 10 Grat. 318.  
     adm'r *v.* Charlton's adm'r, 7 Grat. 425.  
     adm'r *v.* Lamberts, 7 Grat. 425.  
     adm'r *v.* Thurman *et als.*, 11 Grat. 752.  
     adm'r *v.* Betty, 11 Grat. 752.  
 SNEAD *v.* Coleman *and* wife, 7 Grat. 300.  
 SNYDER *et als.* *and* Bell's heirs, 10 Grat. 350.  
 SOMERVILLE *v.* Wimbish, 7 Grat. 205.  
 SOUTHER'S Case, 7 Grat. 673.  
 SPEER *and* Morrison, 10 Grat. 228.  
 SPENCE *v.* Bagwell *et als.*, 6 Grat. 444.  
 SPILLER *and* Smith's ex'or, 10 Grat. 318.  
 SPINDLE *and* Taylor's adm'r, 2 Grat. 44.  
 SPRAGGINS *and* Wills, 3 Grat. 555.  
 SPRAULL *et als.* *and* Currin *et als.*, 10 Grat. 145.  
 SPURGIN *and* Evans *and* wife, 6 Grat. 107.  
     *et als.* *and* Evans *et als.*, 11 Grat. 615.  
 STAATS *v.* Board, 10 Grat. 400.  
 STAFFORD *v.* Carter *et als.*, 4 Grat. 63.  
     *v.* White, 6 Grat. 93.  
 STAINBACK *v.* Bank of Virginia, 11 Grat. 260.  
     *v.* Bank of Virginia, 11 Grat. 269.  
     *v.* Read & Co., 11 Grat. 281.  
 STARKE'S adm'r *and* Ruff, 3 Grat. 134.  
     adm'r *et als.* *and* Talley *et als.*, 6 Grat. 339.  
 STATON, R., *and* Pittman, sheriff, 11 Grat. 99.  
     B., *v.* Pittman, sheriff, 11 Grat. 99.  
 ST. CLAIR *and* Pates, 11 Grat. 22.  
     *and* the Commonwealth, 1 Grat. 556.  
 STEELE *v.* Levisay *et als.*, 11 Grat. 454.  
 STEPHENS *v.* Hutchinson *et als.*, 6 Grat. 147.

- STEPHENS et als. *and* O'Brien et als., 11 Grat. 610.  
 STEPHENSON *v.* Taverners, 9 Grat. 398.  
 STERRETT *v.* Teaford, 4 Grat. 84.  
 STONE and Wife *and* Armstrong, 9 Grat. 102.  
     *v.* Wilson, 10 Grat. 529.  
 STRANGE'S ex'or *and* George, 10 Grat. 499.  
 STRANGE *v.* Floyd, 9 Grat. 474.  
 STRATTON et als. *and* Peyton et als., 7 Grat. 380.  
     *and* Phaup, &c., 9 Grat. 615.  
     et als. *and* Powell, 11 Grat. 792.  
 STRIDER *v.* Reid's adm'r, 2 Grat. 38.  
 STRINGER *and* Henderson, 6 Grat. 130.  
     *and* Taylor's devisees, 1 Grat. 158.  
 STUART, &c., *and* Forkner, 6 Grat. 197.  
 STUART'S ex'ors *v.* Abbott et als., 9 Grat. 252.  
 STRIDER'S adm'r *and* Reid's adm'r, 7 Grat. 76.  
 STUBBS *and* Sheppard, 3 Grat. 373.  
 STUBBLEFIELD *v.* Beazley, 5 Grat. 51.  
 STUMP, &c. *and* Bryan, 8 Grat. 241.  
 STURDIVANT et al. *v.* Birchett, 10 Grat. 67.  
 SUMMERS *and* Todd, 2 Grat. 167.  
 SUTHERLAND et als. *and* Laws' ex'ors, 5 Grat. 357.  
 SUTTON *v.* Sutton, 7 Grat. 234.  
 SWAIN *and* Galt's ex'or et als., 9 Grat. 633.  
 SWOPE *and* Mays, 8 Grat. 46.  
     *v.* Chambers, 2 Grat. 319.  
  
 TABB'S adm'r *v.* Archer's adm'r et als., 7 Grat. 408.  
 TAGGART'S Case, 8 Grat. 697.  
 TAIT'S adm'r *and* Kyles, 6 Grat. 44.  
 TALIAFERRO *v.* Franklin, 1 Grat. 332.  
 TALLEY et als. *v.* Starke's adm'x et als., 6 Grat. 339.  
 TAPSCOTT *v.* Cobbs et als., 11 Grat. 172.  
 TAVERNER *and* Emerick, &c., 9 Grat. 220.  
 TAVERNERS *and* Stephenson, 9 Grat. 398.  
 TAYLOE *v.* Smith, 10 Grat. 557.  
 TAYLOR *v.* Beale et als., 4 Grat. 93.  
     *and* McCance, 10 Grat. 580.  
     *and* Parramore, 11 Grat. 220.  
 TAYLOR'S devisees, *v.* Burnside, 1 Grat. 165.  
     devisees, *v.* Stringer, 1 Grat. 158.  
     adm'r, &c. *and* Beall's adm'r, 2 Grat. 532.  
     adm'r *v.* Spindle, 2 Grat. 44.  
 TEAFORD *and* Sterrett, 4 Grat. 84.  
 TEAYS et als. *and* Davis et als., 3 Grat. 283.  
 THAMER *and* Forward's adm'r, 9 Grat. 537.  
 THISTLES ex'ors *and* McClure, 2 Grat. 182.  
 THOMAS' adm'x *and* Cox and others, 9 Grat. 312.  
     adm'x *and* Cox et als., 9 Grat. 323.  
 THOMAS *v.* Dawson and wife, 9 Grat. 531.  
     *v.* Gaines, 1 Grat. 347.  
 THOMPSON'S Case, 8 Grat. 637.  
     adm'r et als. *and* Smith et als., 7 Grat. 112.  
 THOMPSON & Teays *and* James River & Ka. Co., 3 Grat. 270.  
     et als. *and* Thornton, 4 Grat. 121.  
     *and* Griffith, 4 Grat. 147.  
     et als. *and* Gillespie et als., 5 Grat. 132.

- THOMPSON *and* Clough, &c., 7 Grat. 126.  
     *et als. and* Meek's adm'r, &c., 8 Grat. 134.  
     *v.* Govan, 9 Grat. 695.  
     *et als. and* M. Blair, 11 Grat. 441.  
 THORNTON *v.* Thompson *et als.*, 4 Grat. 121.  
 THORNTON *et als. and* More, 7 Grat. 99.  
     *et als. and* West's adm'r *et als.*, 7 Grat. 177.  
 THRELKELDS *v.* Campbell, 2 Grat. 198.  
 THURMAN *et als. and* Smith's adm'r, 11 Grat. 752.  
 TIERNAN'S Case, 4 Grat. 545.  
 TIFFANY *and* Carroll *et als.*, 9 Grat. 269.  
 TIFFANY *v.* Kent *et als.*, 2 Grat. 231.  
 TODD *v.* Summers, 2 Grat. 167.  
 TOLER *and* Fleming, 7 Grat. 310.  
 TOMPKINS' trustees *and* Roote's ex'x, 3 Grat. 98.  
 TONCREY *and* White's adm'x, 5 Grat. 180.  
 TOWNES *et als. and* French, 10 Grat. 513.  
 TRACEWELLS *and* Kincheloe, 12 Grat. 587.  
 TRAVIS' adm'r *and* Deneufville's adm'r, 5 Grat. 28.  
 TREVILLIAN *v.* Louisa Railroad Co., 3 Grat. 326.  
 TRICE *v.* Cockran, 8 Grat. 442.  
 TROTTER *and* wife *and* Mitchell's adm'r, 7 Grat. 136.  
 TRIMYER *v.* Pollard, 5 Grat. 460.  
 TREDGAIN *et als. and* Beach, 2 Grat. 219.  
 TUCKER *et als. and* Wayland, 4 Grat. 267.  
     *v.* Daly, assignee, 7 Grat. 330.  
 TURNER *and* wife *v.* Campbell *et als.*, 3 Grat. 77.  
     *and* Davis, 4 Grat. 432.  
     *and* Walker, 2 Grat. 534.  
     *v.* Turner's adm'r, 1 Grat. 11.  
 TURPIN *and* Sheppards, 3 Grat. 373.  
 TURPIN'S adm'r *et als. and* Montague's ex'x, 8 Grat. 453.  
 TUTT *v.* Slaughter's adm'r, 5 Grat. 364.  
 TYREE *et als. v.* Donnally, 9 Grat. 64.  
     *v.* Wilson, 9 Grat. 59.  
 UHL *et als.* Case, 6 Grat. 706.  
 UNION Bank of Maryland *v.* Beirne, 1 Grat. 226.  
 UNIS *and* Charlton, 4 Grat. 58.  
 UNITED STATES *v.* Blakeney, 3 Grat. 405.  
     *v.* Lipscomb, 4 Grat. 41.  
 UNITED STATES MINING CO. *and* Crump, 7 Grat. 352.  
 UPPER APPOMATTOX CO. *and* Nash, 5 Grat. 332.  
     *v.* Hardings, 11 Grat. 1.  
 UTZ *et als. and* Carpenter *and* wife, 4 Grat. 270.  
 VANCE *v.* Monroe, 4 Grat. 62.  
     *v.* McLaughlin's adm'r, 8 Grat. 289.  
 VANDINE'S Case, 6 Grat. 689.  
 VANMETER'S ex'ors *v.* Vanmeters, 8 Grat. 148.  
 VARNER'S ex'ors *and* Masters, 5 Grat. 168.  
 VATHIR *v.* Zane, 6 Grat. 306.  
 VAUGHN'S Case, 10 Grat. 758.  
 VAWTER *et als. and* Mundy, 3 Grat. 518.  
     *v.* Watt's ex'ors *et als.*, 3 Grat. 518.  
 VIA'S heirs *and* Price, 8 Grat. 79.  
 VIRGINIA BANK *v.* Robinson, 5 Grat. 174.

- WADSWORTH et als. *v.* Allen, &c., 8 Grat. 174.  
 WAITE and Hunters, 3 Grat. 26.  
 WALKER and Newbrough, 8 Grat. 16.  
     *v.* Turner, 2 Grat. 534.  
 WALKUP and others and Armstrong's heirs, 9 Grat. 372.  
 WALLER *v.* Waller, 1 Grat. 454.  
 WALLOP'S adm'r *v.* Scarborough et als., 5 Grat. 1.  
 WALTON *v.* Hale, 9 Grat. 194.  
 WARD and Archer, 9. Grat. 622.  
 WARDENS and Hagan, &c., 3 Grat. 315.  
 WARDSWORTH, &c., *v.* Miller, &c., 4 Grat. 99.  
 WARE and Rust et als., 6 Grat. 50.  
 WASHBURN and Levasser, 11 Grat. 572.  
 WASHINGTON and Lewis, 5 Grat. 265.  
 WASHINGTON'S ex'or and White, 5 Grat. 645.  
 WASHINGTON *v.* Lumpkin, 5 Grat. 432.  
     *v.* Pollard, 5 Grat. 432.  
 WASHINGTON'S ex'or *v.* Abrahams, et als., 6 Grat. 66.  
     and Brooke, 8 Grat. 248.  
 WASLEY'S ex'or et als., and Parker and wife, 9 Grat. 477.  
 WATSON *v.* Hurt, 6 Grat. 633.  
     *v.* Fletcher, 7 Grat. 1.  
     and Fletcher, 7 Grat. 1.  
     and Cleland, 10 Grat. 159.  
 WATTS *v.* Christian et als., 3 Grat. 518.  
 WATT'S ex'ors et als. and Vawter et als., 3 Grat. 518.  
 WAYLAND *v.* Tucker et als., 4 Grat. 267.  
 WAYS adm'r &c., and Ash, 2 Grat. 203.  
 WEAVER *v.* Skinner, 4. Grat. 160.  
     and Marsteller, 1 Grat. 391.  
 WEBSTER'S Case, 8 Grat. 702.  
 WELCH and Kean, 1 Grat. 403.  
 WELLES *v.* Cole, et als., 6 Grat. 645.  
 WELLFORD et als. *v.* Chancellor, 5 Grat. 39.  
 WELLING'S Case, 6 Grat. 670.  
 WELLS' adm'r and Clarke, 6 Grat. 475.  
 WESTS' adm'r et als. *v.* Thornton et als., 7 Grat. 177.  
 WHITE et als. and Moores, 3 Grat. 139.  
 WHITE'S adm'r *v.* Toncray, 5 Grat. 180.  
 WHITE *v.* Washington's ex'or., 5 Grat. 645.  
     *v.* Turner's adm'r, 2 Grat. 502.  
     *v.* Coleman, 6 Grat. 138.  
     and Stafford, 6 Grat. 93.  
 WHITING *v.* Rust, 1 Grat. 483.  
 WHITWORTH and wife and Puckett 2 Grat. 528.  
 WHOLFORD'S Case, 4 Grat. 523.  
 WILCOX and Brooks, 11 Grat. 411.  
 WILD'S lessee *v.* Serpell, 10 Grat. 405.  
 WILEY et als. *v.* Givens et als., 6 Grat. 277.  
 WILKINSON & Hunt and Early, 9 Grat. 68.  
 WILKINSON & Hunt and Friend, 9 Grat. 31.  
 WILLARD *v.* Overseers of the Poor of Wood County, 9 Grat. 139.  
     Overseers of the Poor, 203.  
 WILLIAMS et als. and Knisely, 3 Grat. 265.  
 WILLIAMS' Case, 5 Grat. 702.  
     Case, 2 Grat. 567.  
 WILLIAMS, &c., and Phillipps et als., 5 Grat. 259.

- v. Givens*, 6 Grat. 268.  
*v. Williams et als.*, 11 Grat. 95.  
**WILLIAMSON** *v. Gayle et als.*, 4 Grat. 180.  
**WILLIAMSON'S M.**, Case, 4 Grat. 554.  
     Case, 4 Grat. 547.  
**WILLIAMSON** *v. Crawford*, 7 Grat. 202.  
     *v. Gayle et als.*, 7 Grat. 152.  
**WILLIAMSON'S ex'or** *v. Goodwin et als.*, 9 Grat. 503.  
**WILLS** *v. Spraggins*, 3 Grat. 555.  
**WILLS' adm'r** *v. Dunn's adm'r*, 5 Grat. 384.  
**WILSON and Hanna**, 3 Grat. 243.  
     *et als v. Burfort treasurer*, 2 Grat. 134.  
     *and Purcell and wife et als.*, 4 Grat. 16.  
     *v. Buchanan*, 7 Grat. 334.  
     *and Tyree et als.*, 9 Grat. 59.  
     *and Stone*, 10 Grat. 529.  
     *v. Lazier et. als.*, 11 Grat. 477.  
**WIMBISH and Somerville**, 7 Grat. 205.  
**WINGFIELD'S adm'r and Jincey et als.**, 9 Grat. 708.  
**WINFREE and Nowlin and wife**, 8 Grat. 346.  
**WINN et als. v. Carroll et als.**, 2 Grat. 227.  
**WISE** *v. Lamb*, 9 Grat. 294.  
**WITHERS** *v. Carter, et als.*, 4 Grat. 407.  
     *and Governor for Liggatt*, 5 Grat. 24.  
     *v. Hestend*, 5 Grat. 456.  
**WOOD'S adm'r and Braxton**, 4 Grat. 25.  
     *ex'or v. Depriest et als.*, 5 Grat. 6.  
**WOODS and Friend, &c.**, 6 Grat. 189.  
     *and Friend*, 9 Grat. 37.  
**WOOD and Slack**, 9 Grat. 40.  
**WOODSON, trustee, v. Perkins**, 5 Grat. 345.  
     *and Bowles*, 6 Grat. 78.  
**WOOTEN** *v. Bragg*, 1 Grat. 1.  
**WORMLEY'S Case**, 8 Grat. 712.  
     Case, 10 Grat. 658.  
**WORSHAM** *v. Hardaway's adm'r*, 5 Grat. 60.  
**WRIGHT and Greers**, 6 Grat. 154.  
     *v. Michie*, 6 Grat. 354.  
**WYATT and Jordan**, 4 Grat. 151.  
**WINN** *v. Harman's devisees*, 5 Grat. 157.  
**WYSOR'S Case**, 6 Grat. 711.  
**WYSONG and Kretzer**, 5 Grat. 9.  
  
**YANCEY et als. and Hobson**, 2 Grat. 73.  
**YARBROUGH and wife** *v. Deshazo*, 7 Grat. 374.  
**YATES' adm'r and Commonwealth**, 9 Grat. 693.  
**YEAGER, ex parte**, 11 Grat. 655.  
**YERBY and wife** *v. Lynch et als.*, 3 Grat. 460.  
**YOUNG'S Case**, 4 Grat. 550.  
**YOUNG** *v. Highland*, 9 Grat. 16.  
**YOUNG'S adm'r and Bowyer** *v. M'Clung et als.*, 9 Grat. 336.  
**YOUNG for, &c. v. Johnston**, 10 Grat. 269.  
  
**ZANE and Vathir**, 6 Grat. 246,  
     *and Prentice and Weissinger*, 2 Grat. 262.  
**ZANE'S trustees et als. and Johnston**, 11 Grat. 552.



















